Serial: 150353

IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-M-01534-SCT

GOVERNOR HALEY BARBOUR AND SECRETARY OF STATE DELBERT HOSEMANN — ***Petitioners***

v.

TRUDY BERGER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE BOARD OF ELECTION COMMISSIONERS OF PIKE COUNTY AND AS A QUALIFIED ELECTOR — ***Respondent***

EN BANC ORDER

The matter before the En Banc Court is the Petition for Extraordinary Writ Vacating Writ of Mandamus, Reversing and Rendering Declaratory Judgment, and Motion to Suspend the Rules for Emergency Stay, and for Other Relief ("Petition"), filed by Governor Haley Barbour and Secretary of State Delbert Hosemann. Petitioners seek reversal of the circuit court's declaratory judgment, injunction, and mandamus. We grant in part and deny in part.

BACKGROUND FACTS AND PROCEEDINGS

On September 9, 2008, Trudy Berger filed a Verified Complaint for Declaratory Judgment, Mandamus, Prohibition and Injunction, in the Circuit Court of the First Judicial District of Hinds County, alleging that the sample ballot for the upcoming general election, promulgated by Secretary Hosemann, and approved by Governor Barbour, failed to comply

with the requirements of law, in that it relegated to the end of the ballot the special election for a United States Senator to fill the unexpired term of Senator Trent Lott, who resigned from office. On that same day, Berger filed motions for a temporary restraining order and for a preliminary injunction.

The relief sought by Berger was (1) a Rule 57 declaratory judgment,[1] "determining the construction of Sections 23-15-367 and 23-15-855 as these sections relate to the placement of the special election for United States Senator on the official ballot;" and declaring that Secretary Hosemann's decision to list the special election for United States Senator at the bottom of the ballot violates the plain language and statutory purpose of Section 23-15-367(2), of the Mississippi Code; (2) a writ of prohibition or, alternatively, a writ of mandamus commanding Secretary Hosemann "to refrain from issuing an official ballot that does not have the special election for United States Senator appearing immediately below the general election for United State[s] President and alongside or immediately below the general election for United States Senator;" (3) a "temporary restraining order and a preliminary and permanent injunction enjoining [Governor Barbour and Secretary Hosemann] from causing the official ballot to have the special election for United States Senator appear anywhere other than immediately below the general election for United State[s] President and alongside or immediately below the general election for United States Senator."

---

[1]Miss. R. Civ. P. 57.

On September 9, 2008, without notice to Governor Barbour or Secretary Hosemann, the circuit judge entered an ex parte temporary restraining order which prohibited Secretary Hosemann from distributing the sample ballot to the various county election commissions throughout the state. Governor Barbour and Secretary Hosemann filed a petition for emergency relief with this Court and, on September 10, 2008, a three-justice panel of this Court dissolved the temporary restraining order.

On September 11, 2008, the circuit judge held a hearing on the other relief requested by Berger. The following day, she rendered a Declaratory Judgment and Order which granted the declaratory relief requested, and ordered Governor Barbour and Secretary Hosemann to take certain acts – and to refrain from taking certain acts – with respect to the ballots.

Immediately following the entry of the Circuit Court's order, Governor Barbour and Secretary Hosemann filed the Petition currently pending before this Court, to which Berger filed a response. The Attorney General filed an amicus brief, and Governor Barbour and Secretary Hosemann filed a reply brief.

On September 17, 2008, the En Banc Court held oral argument on the issues before the Court. Also on September 17, the Governor and Secretary of State filed a direct appeal from the circuit court's Declaratory Judgment and Order, No. 2008 TS-01562. Because all parties agree that the public interest warrants a speedy resolution of this controversy, we consolidate the direct appeal with the instant motion, dispense with briefing in the direct appeal, and decide them together. After due consideration, and for the reasons stated below, we grant in part, and deny in part, the relief requested in the Petition.

ANALYSIS

All parties conceded at oral argument that they were raising no procedural infirmities which would prevent this Court from forthwith proceeding to determine the substantive issues. Therefore, the unusual procedural route by which this matter reached this Court shall not be considered or addressed.

I.

Injunction and mandamus.

We first address the Petition, insofar as it seeks reversal of the Circuit Court's issuance of a mandamus and injunction.[2] The mandamus orders Governor Barbour and Secretary Hosemann to take certain acts, and the injunction orders them to refrain from taking other acts. In other words, the circuit judge has instructed the Governor and Secretary of State to perform their duties in a particular way.

This Court, and other courts, have long recognized that the Governor must be allowed to perform his duties without interference from the courts. *See e.g.* ***Barbour v. State ex rel. Hood***, 974 So. 2d 232, 238 (Miss. 2008) ("This Court repeatedly has prohibited issuance of a writ of mandamus against the Governor."); ***Fordice v. Thomas***, 649 So. 2d 835, 840 (Miss. 1995) ("[A] writ of mandamus will not lie against the Governor."); ***State v. McPhail***, 182 Miss. 360, 375-76; 180 So. 387, 391-92 (1938) ("[I]t is true that no writ of injunction or mandamus or other judicial remedial writ will run against the Governor . . . [because] the

[2]Although the Circuit Judge purported to issue a mandamus and injunction against the Election Commission, it was not a party to those proceedings, and is not a party here. We shall therefore not address here the power of the courts to issue mandamus or injunctions against the Election Commission.

Governor is not subject to control by the courts, nor . . . can any mandamus, prohibition, or injunction direct or restrain him in the exercise of his power . . . ."); ***Wood v. State***, 169 Miss. 790, 795; 142 So. 747, 749 (1932) ([T]he Governor cannot be compelled by mandamus to perform any act.").

The rationale behind these cases is that the Governor is a constitutional officer who must be allowed to perform his or her duties without prior restraint or interference from the courts. That is not to say, however, that the acts of the Governor and Secretary of State are beyond review of the courts. Once an act is performed, it is then subject to judicial review and, if the act is found to have violated the law, the constitutional officer is subject to the penalties provided by law. *See* ***Barbour v. State ex rel. Hood***, 974 So. 2d at 239 ("No governor, or for that matter, any governmental official, can exercise power beyond their constitutional authority.").

Based on the record in this case, and Berger's failure to establish a constitutional basis for the circuit judge's authority to issue a mandamus and injunction against the Governor and Secretary of State, we grant the Petition to the extent that we vacate the mandamus and injunction.

II.

Declaratory judgment.

We next address the declaratory judgment issued by the Circuit Court. The question presented may be succinctly stated as follows:

> When read together, do Sections 23-15-367 and 23-15-511, of the Mississippi Code, require that the candidates in the special election for United States

Senator be listed at the beginning of the ballot under the category of "candidates for national office," or may the Secretary of State list them at the end of the ballot, following all races in the general election?

Citing two reasons, Petitioners argue that Secretary Hosemann had authority to list the special election at the end of the ballot. First, they point out that, in the past, special elections have been listed at the end of the ballot. Second, they argue that the language of Section 23-15-511 provides authority to list the race at the end of the ballot.

Section 23-15-367

Special elections were relegated to the end of the ballot in the 1990, 1991, and 1992 general elections, and perhaps others prior to 2000. However, the Legislature elected to change the law in 2000. Section 23-15-367, as amended in 2000, provides, in pertinent part:

> (1) Except as otherwise provided by Sections 23-15-974 through 23-15-985 and subsection (2) of this section, the arrangement of the names of the candidates, and the order in which the titles of the various offices shall be printed, and the size, print and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangement need not be uniform.
>
> (2) The titles for the various offices shall be listed[3] in the following order:[4]
>
> (a) Candidates for national office;
>
> (b) Candidates for statewide office;
>
> (c) Candidates for state district office;
>
> (d) Candidates for legislative office;

---

[3]The Legislature's use of the term "shall" leaves no room for exceptions.

[4]Not only does the statute provide an exhaustive list of six categories, but it also mandates the "order" the categories must appear on the ballot.

(e) Candidates for countywide office;

(f) Candidates for county district office.

The order in which the titles for the various offices are listed within each of the categories listed in this subsection is left to the discretion of the officer charged with printing the official ballot.

Miss. Code Ann. § 23-15-367 (Rev. 2007) (footnotes and emphasis added). Notwithstanding this change in the law, the Mississippi Secretary of State continued to follow the prior practice of listing special election candidates at the end of the ballot in 2002, 2004, and 2006, without the benefit of judicial review. Thus, this is a matter of first impression. We find Section 23-15-367 to be clear and unambiguous.

Subsection (1)

Subsection (1)'s language, "Except as otherwise provided by . . . subsection (2)" means that the language of subsection (2) is superior to, and controls, the language of subsection (1). Thus, we look to subsection (2).

Subsection (2)

With respect to placing on the ballot a United States Senatorial race – regardless of whether or not the race is a special election – the statute's words – "The titles for the various offices shall be listed in the following order" – can have but one meaning.[5] Since a candidate for United States Senator is a candidate for national office, then all races for the United States Senate must be included under the category, "Candidates for national office," which

[5]It is worth pointing out parenthetically that subsection (2) lists six specific categories within which the titles for the "various offices" must be listed, and those six categories do not include a separate or special category for special elections.

comes before any other category. So long as the statutory order of categories is followed, the "order in which the titles for the various offices are listed within each of the categories listed in [the] subsection is left to the discretion of the officer charged with printing the official ballot." *Id.* (emphasis added). In other words, so long as all national races are listed in the first category, the order of the races within that category is left to "the discretion of the officer" in charge of having the official ballot printed.

Section 23-15-511

Section 23-15-511[6] – the statute relied upon by Petitioners – indeed applies "when a special election shall occur on the same day as the general election." However, careful review of the statute's language reveals no support for the Petitioners' position. The statute provides, in pertinent part:

> In those years when a special election shall occur on the same day as the general election, the names of candidates in any special election and the general election shall be placed on the same ballot by the commissioners of elections or officials in charge of the election, but the general election candidates shall be clearly distinguished from the special election candidates.

Miss. Code Ann. § 23-15-511 (Rev. 2007).

We see no conflict whatsoever between Section 23-15-367(2)'s requirement to list the "titles for the various offices . . . within each of the categories listed," and Section 23-15-511's mandate to distinguish the general election candidates from the special election candidates, a simple requirement that can be easily accomplished "within each of the [six] categories listed."

---

[6]Section 23-15-833 includes a similar provision which applies "when the regular special election day shall occur on the same day as the general election." Miss. Code Ann. § 23-15-833.

If, within the ballot's first category of "Candidates for national office," the candidates for all national offices are listed, with the special senatorial race candidates clearly distinguishable from the general senatorial race candidates, then both code sections are satisfied. If, however, the special United States Senatorial race is relegated to the end of the ballot in a category of its own, then the mandate of Section 23-15-367(2) is not met.

The two statutes, read together, require the special election for the senate seat vacated by Trent Lott to be placed on the ballot within Section 23-15-367(2)'s first category, that is, "Candidates for national office," in a manner that is "clearly distinguishable" from the general election senatorial candidates.

We find that the special election for United States Senator must be listed in the first category of the ballot, along with all other national elections, and the law assumes the Governor and Secretary of State will follow the law. The Circuit Judge exceeded her authority, however, by ordering the Governor and Secretary of State to prepare the ballot in a particular manner, and to take other actions with respect to the up-coming election. The Governor and Secretary of State must be allowed to attend to their constitutional duties, free of interference by way of mandamus, injunction, or instruction. Of course, once the Governor and Secretary of State act, their decisions and actions are then subject to judicial review. It is, therefore

ORDERED, that the this matter, Case No. 2008-M-01534, and the direct appeal in Case No. 2008-TS-01562 are hereby consolidated for all purposes. It is further

ORDERED, that the Petition requesting that this Court vacate the mandamus and injunction is granted, and the mandamus and injunction are hereby vacated. It is further

ORDERED, that the Petition requesting that this Court reverse and vacate the declaratory judgment is denied, insofar as the declaratory judgment interprets Mississippi law to require the special election for United States Senator to be listed in the same category on the official ballot as all other contests for national office, but in a manner which clearly distinguishes the special election for general election contests. It is further

ORDERED, that the Petition requesting that this Court reverse and vacate the declaratory judgment is granted in all other respects, including insofar as the declaratory judgment requires the Governor and Secretary of State to take certain prospective actions, and to refrain from others, and insofar as the declaratory judgment mandates the arrangement of election contests within the category of national offices. It is further

ORDERED, that the Petitioners' Motion to Suspend the Rules for Emergency Stay is denied.

SO ORDERED, this the 18TH day of September, 2008.

JESS H. DICKINSON, JUSTICE
FOR THE COURT

SMITH, C.J., CARLSON, RANDOLPH AND LAMAR, JJ., AGREE.

WALLER, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN STATEMENT.

DIAZ, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN STATEMENT, JOINED BY EASLEY AND GRAVES, JJ.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-M-01534-SCT

GOVERNOR HALEY BARBOUR AND SECRETARY OF STATE DELBERT HOSEMANN

v.

TRUDY BERGER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE BOARD OF ELECTION COMMISSIONERS OF PIKE COUNTY AND AS A QUALIFIED ELECTOR

WALLER, PRESIDING JUSTICE, CONCURRING IN PART AND DISSENTING IN PART WITH SEPARATE WRITTEN STATEMENT:

I agree with the majority that the writ of mandamus and injunction should be vacated. I also agree that the circuit court cannot require the Governor or the Secretary of State to take, or refrain from taking, certain prospective actions. However, I strongly disagree with the majority's decision to affirm the circuit court's interpretation of the two statutes at issue.

The majority has substantially encroached upon the constitutional authority of the Governor. Earlier this year, we held that when the Governor is entrusted to administer a statutory scheme that is silent or ambiguous on a specific issue, the Governor's interpretation should be afforded deference so long as it is based upon a permissible construction of the statute(s). ***Barbour v. State ex rel. Hood***, 974 So. 2d 232, 239-43 (Miss. 2008). By today's order, the Governor's permissible interpretation of the statutes before us is disregarded.

For the aforementioned reasons, I respectfully concur in part, and dissent in part.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-M-1534-SCT

GOVERNOR HALEY BARBOUR AND SECRETARY OF STATE DELBERT HOSEMAN

v.

TRUDY BERGER, ET. AL

DIAZ, PRESIDING JUSTICE, CONCURRING IN PART AND DISSENTING IN PART WITH SEPARATE WRITTEN STATEMENT:

Given the governor's recent success at convincing seven members of this Court that a year is sometimes not a year, *see* ***Barbour v. State ex. rel. Hood***, 974 So. 2d 232 (Miss. 2008), one cannot fault him for daring to return to our chamber and insisting that the top is sometimes not the top. Miss. Code Ann. § 23-15-367 (2008). Today's decision can hardly leave the members of the Court with a sense of accomplishment. On one hand, we have reached the only reasonable conclusion for the question set before us – that state law demands that all national elections, general and special, appear at the top of the November ballot. Miss. Code Ann. § 23-15-367. But on the other, by holding that Judge Green exceeded her authority by ordering Governor Barbour and Secretary of State Hosemann to comply with state law, we send out from our chamber little more than a dressed-up request that this now-settled law be complied with. Therefore, although I concur in the Court's determination of the substantive question of law, I dissent from the conclusion that the trial court exceeded its authority.

The case set before the Court is an easy one – a simple exercise in statutory construction. In such cases, the Court is charged with the most elementary of tasks – "[i]f the statute is not ambiguous, the court should interpret and apply the statute according to its plain meaning without the aid of principles of statutory construction." ***Finn v. State***, 978 So. 2d 1270, 1272 (Miss. 2008) (quoting ***Harrison County Sch. Dist. v. Long Beach Sch. Dist.***, 700 So. 2d 286, 288-89 (Miss. 1997)). In other words, our responsibility in cases such as the one before us today is reducible to two simple words: follow instructions.

In this case, Section 23-15-367 of the Mississippi Code commands that political races for national office be placed at the top of an election ballot. Notwithstanding the governor's legal gymnastics about regular and special elections, the majority rightly recognizes that there is nothing difficult about this question. Ronnie Musgrove and Roger Wicker will face each other in November in a special election for a seat in the United States Senate, an office at the national level of government. Races for national office must be placed at the top of our state's ballots. The ballot approved by Secretary of State Hosemann and Governor Barbour placed the Musgrove-Wicker race at the bottom of the ballot. This act violates the law.

A well intended but ultimately misplaced concern for our separation of powers leaves the majority unwilling to order compliance with this finding. The majority rightly notes that the courts of this state operate under "an absence of power in any case to issue a mandamus to require the governor to do any act." ***Vicksburg & M.R. Co. v. Lowry***, 61 Miss. 102, 105 (1883). But this principle should not bind our hands in this case, because the governor's invulnerability to writs of mandamus extends only to "the limits of the power conferred upon

him by the Constitution and the laws..." ***State v. McPhall***, 182 Miss. 360, 376, 180 So. 387 (1938). Our precedent clearly establishes that we may not command the governor to act, "yet, when he has acted ... the legality of the act is a judicial question for the courts." ***Broom v. Henry***, 136 Miss. 132, 148, 100 So. 602 (1924) (citations omitted). In other words, our precedent recognizes what today's decision does not – that there is a fundamental difference between ordering the governor to act and judging the governor when he acts of his own accord. Our mandamus limit notwithstanding, "[i]t is emphatically the province and duty of the judicial department to say what the law is." ***Marbury v. Madison***, 5 U.S. 137, 177 (1803). The Court may not command the governor to act, but when he breaks the law, we are duty-bound to order him to stop. Ultimately, despite the purity of the majority's intentions, today's decision neglects that duty.

I do not read the trial court order in this case as a writ of mandamus against the governor and secretary of state. While the action below was not brought against the state election commission, clearly the duties of the governor and secretary of state as members of the election commission were centrally at issue. It is equally clear that a writ of mandamus could issue properly against the election commission, and that Berger would have been better served by filing suit not against the governor and secretary of state, but rather against the election commission itself. Although we repeatedly have said that we will not issue a writ of mandamus against the governor, we have never suggested that the state election commission is immune from mandamus simply by virtue of the governor's membership thereon – and for good reason. The central underpinning of this Court's prohibition on writs

of mandamus against the governor is our constitutional separation of powers. *See* ***Lowry***, 61 Miss. at 105 ("Whence comes this ascendancy of the judiciary over the executive? They are coordinate departments ... to be kept separate as to the exercise of the power confided to each."). No similar qualms arise regarding the state election commission, because "[e]lection commissioners, under the laws of this state, have judicial and *quasi*-judicial powers..." ***Ruhr v. Cowan***, 146 Miss. 870, 881, 112 So. 386 (1927). The state election commission is not, unlike our three branches of government, constitutionally conceived. Rather, it is purely a creature of statute. *See* Miss. Code Ann. § 23-15-211 (2008). Governor Barbour's role as chief executive, therefore, is wholly distinct from his role as a member of the election commission.

A review of our precedent supports this determination. The Court directly addressed a *de facto* mandamus petition against the state election commission in ***Miss. State Bd. Of Election Comm'rs v. Meredith***, 301 So. 2d 571 (Miss. 1974). In that case, the Hinds County Circuit Court ordered the state election commission to place James Meredith's name on the November 1974 ballot as an independent candidate for Congress – effectively issuing a writ of mandamus against the commission. This Court reversed, but we did so *on the merits* – not because the board was immune from the writ of mandamus. If the state election commission enjoyed such immunity, then the Court would have said as much and saved itself the trouble of analyzing the merits of the case. Indeed, the ***Meredith*** Court's reliance on ***Ruhr*** was distinguished in dissent: "The case of ***Ruhr*** ... was a suit for mandamus. The ultimate point decided was that mandamus would not lie to compel the Election Commission to decide in

a particular manner matters as to which it had discretion."***Meredith***, 301 So. 2d at 576 (Smith, J., dissenting). Again, if a rule existed to immunize the state election commission from writs of mandamus simply by virtue of the governor's membership, then Justice Smith would have so remarked. He did not because there is not.

Furthermore, a recognition of this Court's power to issue writs of mandamus against the state election commission comports with our general approach to mandamus, which regularly issues against county election commissions. *See, e.g.*, ***In re Wilbourn***, 590 So. 2d 1381, 1385 (Miss. 1991) ("[A] court could, if necessary, compel by mandamus an election commission ... to perform its statutory duty upon its failure to do so..."). As early as 1910, this Court reversed a circuit court and issued a writ of mandamus against election commissioners, compelling them to reassemble to fulfill a statutorily imposed duty. ***State ex. rel. Hudson v. Pigott***, 97 Miss. 599 (1910).

The power to issue a writ of mandamus against the state election commission is, of course, subject to this Court's regularly imposed limits – specifically, that the writ will issue only to command action for an officer's or commission's ministerial duties and not for his discretionary duties. Ministerial acts are those which an official is obligated to do, meaning "that a writ of mandamus will not issue unless and until there has been actual default in the performance of some duty required by the defendant." ***Wood v. State***, 169 Miss. 790, 793, 142 So. 747 (1932). Given the statutory requirement in this case that "[t]he titles for the various offices *shall be* listed in the following order" on election ballots, Miss. Code Ann.

§ 23-15-367(2) (emphasis added), there is little room for debate that the duty is not discretionary but ministerial – and therefore subject to a writ of mandamus.

And although the Court generally will not involve itself with the business of managing elections, its noninvolvement is limited. "This Court has long followed the doctrine of non-judicial interference in the election scheme. However, ... it ... can direct an official *or commission* to perform its official duty or to perform a ministerial act ..." ***City of Grenada v. Harrelson***, 725 So. 2d 770, 773 (Miss. 1998) (emphasis added).

Ultimately, I am hopeful – but uneasily so – that my difference of opinion regarding our mandamus authority amounts to little more than an academic debate. Our Constitution unambiguously commands the governor to faithfully execute the laws of the state. Miss. Const. Art. 5 § 123. Just as unambiguously, this Court and this Court alone is charged with the judicial power of our state's government. Miss. Const. Art. 6 § 144. Today, we settle this question of law. The governor is bound by oath to adhere to our determination. We do so with steadfast faith in our longstanding presumption that public officers will perform their duties in the manner required by law. *See* ***Caruthers v. Panola County***, 205 Miss. 403, 416 (1949). Just as this Court is duty-bound to interpret the laws of this state not as we wish they were but rather as they are, "there shall [not] be an arbitrary enforcement by the executive of what he may consider the law to be, but the enforcement of judicial process that is, the enforcement of a right or remedy provided by the law and judicially determined..." ***State v. McPhail***, 182 Miss. 360, 390, 180 So. 387 (1938). "[W]hatever the Governor does in the execution of the laws ... must be ... in strict subordination to the general law of the land." ***Id.***

at 371. Our interpretation of this law is now complete, and our system of government demands faith that the governor will now execute that interpretation.

Finally, I am hopeful that when faced as he is now with his constitutional duties and his partisan loyalties, the governor will act according to his oath rather than his allegiances. Nevertheless, because I would leave the governor's duty to the command of this Court rather than simple hope, I dissent.

EASLEY AND GRAVES, J.J., JOIN THIS SEPARATE WRITTEN STATEMENT.