



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Richmond 23219

May 30, 2014

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The Honorable Gordon F. Erby
Clerk of Court
Lunenburg Circuit Court
11435 Courthouse Road
Lunenburg, Virginia 23952

Dear Mr. Erby:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire regarding the authority of Clerks of Circuit Court (hereinafter simply "Clerks") and other local elected officials to determine the constitutionality of laws of Commonwealth. You also seek guidance related to a Clerk's potential liability for malfeasance if he declines to perform a ministerial duty that he believes to be contrary to the federal or state constitution.

Response

This response addresses only Clerks, and not any other elected officials.¹ It is my opinion that while a Clerk is governed by the federal and state constitutions, he has no authority to deem unconstitutional a statute imposing on him a ministerial duty. Such determinations are made only by the judicial branch, and thereafter interpreted by the judicial branch and other officials charged with doing so.² The duties of a Clerk are ministerial, and decisions relating to constitutionality are discretionary, not ministerial. Whether particular conduct of a Clerk *declining* to apply a statute constitutes malfeasance is a fact-specific determination beyond the scope of an official Opinion of this Office. Conversely, it is my further opinion that, as a general principle, a Clerk who in good faith *performs* his ministerial duties in the absence of clear judicial authority directing him not to do so has not engaged in malfeasance.

¹ Your opinion request makes reference to "constitutional officers; whether they be clerks, sheriffs, commissioners, treasurers, commonwealth attorneys, board [sic] of supervisors, mayors, councilmembers, or other elected officials." As the Clerk of Lunenburg Circuit Court, you are authorized pursuant to § 2.2-505(A) of the *Code of Virginia* to request official advisory opinions of this Office; however, pursuant to § 2.2-505(B), the inquiry must be "directly related to the discharge of [your] duties." This response therefore applies only to Clerks of Circuit Courts. See, e.g., 2009 Op. Va. Att'y Gen. 80, 81 and n.17.

² For example, the Attorney General of Virginia may and should use his independent judgment when there is a question of the constitutionality of a state law. See *Gilmore v. Landsidle*, 252 Va. 388, 478 S.E.2d 307 (1996) (Attorney General James Gilmore).

Applicable Law and Discussion

I. Determinations of Constitutionality

Clerks are constitutional officers whose powers and duties are prescribed by statute.³ Numerous prior opinions of this Office note the broad discretion Clerks have with respect to only the *manner* in which they fulfill their statutory duties, but they do not have the ability to decide whether or not to perform such duties.⁴ Performance of a required ministerial duty is mandatory and not discretionary. As a general rule, Clerks have no inherent powers. The scope of their authority must be determined by reference to applicable statutes,⁵ and no provision of the *Code of Virginia* affords a clerk legal authority to determine whether a particular law is constitutional.

The Supreme Court of Virginia “has consistently characterized the duties of a Clerk as ‘ministerial’ in nature.”⁶ A ministerial act is non-discretionary.⁷ It is “one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority *without regard to, or the exercise, of his own judgment upon the propriety of the act being done.*”⁸ For example, in addressing issues arising from a Clerk’s ministerial duty of recordation, this Office routinely has noted that a Clerk has no authority to weigh the legal sufficiency of a document beyond what is necessary to perform the duty.⁹ I also note that the correct performance of ministerial duties is enforceable through a writ of mandamus.¹⁰

If there is a question about whether any statutory duty of a Clerk is constitutional, it is to be raised by parties in interest in a proper judicial proceeding.¹¹ Since *Marbury v. Madison*,¹² “it has been the

³ VA. CONST. art. VII, § 4.

⁴ See, e.g., 2013 Op. Va. Att’y Gen. 151 n.13, and opinions cited therein (“The clerk, as a constitutional officer, may choose the means by which he fulfills his duties unless the General Assembly has limited his discretion.”). See *id.*, at 153 (“The Clerk of Court, as a constitutional officer, must abide by the law and his oath of office, which requires him to ‘faithfully and impartially discharge all the duties incumbent upon’ him.”) (quoting VA. CONST. art. II, § 7). See also VA. CODE ANN. § 15.2-1634 (2012) (providing expressly that the clerk “shall exercise all powers and all the duties imposed upon such officers by general law).

⁵ 2009 Op. Va. Att’y Gen. 38, 40 (citing, *inter alia*, *Mendez v. Commonwealth*, 220 Va. 97, 255 S.E.2d 533 (1979); *Harvey v. Chesapeake & Potomac Tel. Co.*, 198 Va. 213, 93 S.E.2d 309 (1956)); accord 2003 Op. Va. Att’y Gen. 60; 2001 Op. Va. Att’y Gen. 121.

⁶ *Small v. Fed. Nat’l Mortgage Ass’n*, 286 Va. 119, 127, 747 S.E.2d 817, 821 (2013) (citing cases).

⁷ *Id.* (citing BLACK’S LAW DICTIONARY 28 (9th ed. 2009)).

⁸ *Id.* (emphasis added) (quoting *Moreau v. Fuller*, 276 Va. 127, 135, 661 S.E.2d 841, 845-46 (2008)).

⁹ See, e.g., 1973-74 Op. Va. Att’y Gen. 65A (concluding that “[w]hether a deed which is admitted to record gives constructive notice is a judicial question, and a clerk is not justified in rejecting a deed which appears to meet the requirements of [the applicable statute] on the basis that the acknowledgement . . . may be held to be invalid by a court”); 2002 Op. Va. Att’y Gen. 270, 271 (“clerk has no duty to inquire beyond the statutory requirements for the recordation of an instrument” and “clerk is limited in his ability to refuse to record an instrument that meets the statutory requirements for recordation”); 1987-88 Op. Va. Att’y 208, 210 and opinions cited therein.

¹⁰ See *Richland Med. Ass’n v. Commonwealth, ex rel. State Health Comm’r*, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985) (“Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed on him by law.”).

¹¹ See *Brown v. Saunders*, 159 Va. 28, 35-36, 166 S.E. 105, 107 (addressing whether apportionment bill conformed with constitutional mandates).

¹² 5 U.S. (1 Cranch) 137 (1803).

indisputable and clear function of the courts, federal and state, to pass on the constitutionality of legislative acts”¹³ Indeed, it is well-established that the power

“to interpret law -- to declare what a law *is* or *has been* -- is judicial power. The power to declare what is the law of the state, is delegated to the courts. The power to declare what the law is, of necessity involves the power to declare what acts of the legislature *are*, and what acts of the legislature *are not laws*.”¹⁴

Marbury involved a federal court ruling on the federal constitutionality of a federal statute. The federal judiciary has also ruled on whether particular Virginia laws violate the federal constitution,¹⁵ The Supreme Court of Virginia has ruled on whether Virginia laws violate the Constitution of Virginia,¹⁶ and also on whether they violate the federal constitution.¹⁷

It is well-settled that duly enacted laws of the Commonwealth are presumed to be constitutional,¹⁸ and courts are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity.¹⁹ However, it also should be noted that where a statute is based on a suspect classification, the government bears the burden of proving its validity.²⁰ Although an unconstitutional law is unenforceable,²¹ a statute is not to be declared unconstitutional unless a court is driven to that conclusion.²² Moreover, the Constitution of Virginia has a unique provision, commonly called the “suspension clause,” which provides, “that all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”²³

Thus, a Clerk has no power to invalidate a statute. I therefore must conclude that a Clerk has no authority by which to make independent determinations respecting the constitutionality of statutes, nor may he decline to perform a ministerial duty because of his own personal opinion about constitutional infirmity.²⁴

II. Malfeasance

A prior opinion of this Office explains that malfeasance is a common law crime, indictable as a misdemeanor, and it is an act wrongful in itself, performed under the authority of office.²⁵ The Supreme

¹³ *Wise v. Bigger*, 79 Va. 269, 273 (1884) (citing *Marbury*, 5 U.S. at 170-80).

¹⁴ *Id.*, at 274 (quoting *Wolfe v. McCaull*, 76 Va. 876 (1882)). As Chief Justice Marshall observed in *Marbury*, “the Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish.” 5 U.S. (1 Cranch) at 166. “It is emphatically the province and duty of the Judicial Department [*i.e.*, the federal courts] to say what the law is.” *Id.*, at 177.

¹⁵ *See Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁶ *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008).

¹⁷ *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960).

¹⁸ *Tanner v. Virginia Beach*, 277 Va. 432, 438, 674 S.E.2d 848, 852 (2009).

¹⁹ *Roanoke v. Elliot*, 123 Va. 393, 406, 96 S.E. 819, 824 (1918).

²⁰ *Fisher v. Univ. of Texas*, 570 U.S. 1135 (2013), slip op. at 8 (Kennedy, J.).

²¹ *See Loving*, 388 U. S. at 1.

²² *Roanoke v. James W. Michael’s Bakery Corp.*, 180 Va. 132, 142, 21 S.E.2d 788, 792 (1942) (citing *Richmond Linen Supply Co. v. Lynchburg*, 160 Va. 644, 647, 169 S.E. 554 (1942), *affirmed by* 291 U.S. 641 (1934)).

²³ VA. CONST. art. I, §7.

²⁴ *Cf.* 2007 Op. Va. Att’y Gen. 30 n.8 (citing cases supporting the proposition that administrative agencies have no power to determine the constitutional validity of statutes).

²⁵ 1987-88 Op. Va. Att’y Gen. 69, 71.

Court of Virginia has defined it as “the doing of an act for which there is no authority or warrant of law.”²⁶ It can be the basis for removal from office.²⁷ There are only a few instances where the *Code of Virginia* specifies what conduct will constitute misfeasance or malfeasance.²⁸ Without a statutory definition, they remain common law terms.

The question of whether it is malfeasance for a Clerk to decline to perform a ministerial duty because of his personal doubts about constitutionality is fact-specific. For that reason, this Office cannot express an opinion on the question.

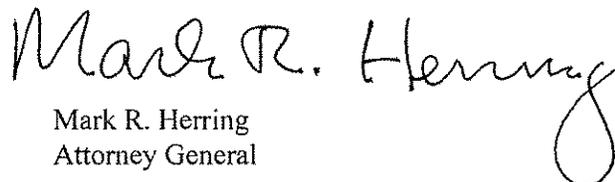
Nevertheless, for the foregoing reasons, it is my opinion that a Clerk who applies standing laws of the Commonwealth in good faith, in the absence of a final decree from a court of competent jurisdiction directing him to do otherwise, has *not* engaged in malfeasance. If a party wishes to challenge the constitutionality of a law being applied by a Clerk, the proper remedy would be mandamus, injunction, prohibition, or declaratory judgment - all civil remedies - not the quasi-criminal remedy of prosecution for malfeasance.

Conclusion

Accordingly, I conclude that while Clerks are subject to the federal and state constitutions, a Clerk performs ministerial duties, and the interpretation of the federal and state constitutions is a discretionary duty for the judicial branch and thus outside his authority. This Office can express no opinion regarding whether *declining* to apply a statute under the circumstances described herein constitutes malfeasance. Nonetheless, it is my opinion that a Clerk who in good faith *enforces* an applicable statute, in the absence of a judicial decree that clearly indicates he should do otherwise, has *not* engaged in malfeasance. Please note that these are only general rules. Again, whether particular conduct constitutes malfeasance is a determination of fact that is beyond the scope of an official opinion of this Office.²⁹

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

²⁶ Warren v. Commonwealth, 136 Va. 573, 118 S.E. 125, 129 (1923).

²⁷ See VA. CODE ANN. § 24.2-233 (2011) (providing that, “[u]pon petition, a circuit court may remove from office any elected officer . . . [f]or neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office . . .”).

²⁸ See, e.g., VA. CODE ANN. §§ 2.2-1115 (2011) (certain purchasing violations constitute malfeasance), 2.2-3122 (2011) (willful violation of State and Local Government Conflict of Interests Act is malfeasance); VA. CODE ANN. § 19.2-55 (2008) (person who issues a search warrant without affidavit guilty of malfeasance); VA. CODE ANN. § 22.1-91 (2011) (certain school division officers guilty of malfeasance in office for expenditures exceeding the funds available for school purposes for that fiscal year).

²⁹ See 1969-70 Op. Va. Att’y Gen. 211A, 212 (concluding that factual situation involving action of a sheriff would have to be judicially weighed to determine whether malfeasance had occurred); 1987-88 Op. Va. Att’y Gen. 69, 72 (explaining, in context of inquiry implicating potential criminal liability for malfeasance or misfeasance for violation of a statute by a public officer, that the application of elements of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth’s attorney, the grand jury, and the trier of fact).