
Coates' Canons Blog: De Facto Officers Versus Intruders

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Article: <http://canons.sog.unc.edu/?p=3438>

This entry was posted on October 22, 2010 and is filed under Elections, Removal Of Elected Officials

Last November the voters elected a new town council, and to celebrate the victors invited their local congressman to administer the oath of office. Several months later some pedant pointed out that North Carolina law doesn't permit congressmen to administer oaths of office, and so the new board had not legally qualified for office. The board members quickly took the oath before a proper officer, but townspeople are now asking: What's the status of each of the actions the board has taken since the organizational meeting?

In fact the board members, before they took the oath in a legal manner, were de facto officers, and as such their actions remain as valid as if the board members had been de jure (or entirely legal) officers. The School of Government has just published a local government law bulletin that summarizes the law of de facto officers in North Carolina, which is available for reading or downloading [here](#). What follows is a short summary of the law as set out at length in the bulletin.

The case law distinguishes among three different legal statuses that might be ascribed to a person who appears to hold a public office: the person might be a de jure officer, or a de facto officer, or what the courts characterize as an intruder or usurper. As a practical matter, to the outside world there is no legal difference between the acts of a de jure officer and a de facto officer – the actions are valid and cannot be attacked on the ground that the officer is not legally in office. (The difference between the two kinds of officers is that if the person's status is challenged directly, in an action in the nature of quo warranto, the de jure officer will survive the challenge while the de facto officer will not.) If a person is a mere intruder or usurper, however, any actions taken by the person are invalid and will not be recognized or enforced by the courts.

The rationale for upholding the actions of de facto officers has been articulated a number of times by the North Carolina courts. The most recent expression is found in *In re Wingler*, a 1950 case, found at 231 N.C. 560, 58 S.E.2d 372. The court wrote that:

The de facto doctrine is indispensable to the prompt and proper dispatch of governmental affairs. Endless confusion and expense would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action. An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. The administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office.

What does it take to become a de facto officer? The North Carolina courts have joined the courts of most other states in recognizing four categories of de facto officers, based on the opinion in an 1871 case from Connecticut.

1. The person has been in the office for an extended period and has been generally recognized as the officeholder. A number of early cases that fall in this category involved persons who had originally been lawfully appointed to office but who continued in office without any evidence of subsequent reappointment.
2. The person has been validly appointed or elected to the office, but has failed to properly take the oath of office or post a required bond. This is the case of our unfortunate town council.

3. The person appears to have been properly appointed or elected, but it turns out either that the appointing authority did not actually have authority to make the appointment or that the person was in fact not eligible for the office. In one case, for example, a city council member turned out to have been convicted of a felony at some time in the past and had not yet had his rights of citizenship restored. Therefore, under the constitution, he was ineligible for elective office.

4. The law under which the person has been elected or appointed is unconstitutional. The most prominent cases in this category in North Carolina were challenges to actions by the town boards of beach towns, where the town charters attempted to enfranchise persons who owned property in the towns but were not in fact resident there.

What, then, makes an intruder or usurper? The terms conjure up a marauding band that takes over a small town, physically removing the elected officers and purporting to act in their stead. Such a band would certainly be intruders or usurpers, but they tend to happen more often in Clint Eastwood movies than in real life. There are, in fact, three common situations in which persons have been held to be intruders, one of which has the possibility of creating significant mischief for local governments. In addition, the third situation suggests a fourth, which might also create significant mischief.

1. An officer's term of office has expired, his or her replacement is in office, and yet the former officer purports to take some kind of official action.

2. An officer has resigned, the resignation has been accepted, but the former officer continues to exercise the duties of the office.

3. An officer holds too many offices under the limitation on multiple office holding, now found in Article VI, § 9, of the North Carolina constitution. In a series of cases, the North Carolina Supreme Court has treated persons in violation of the constitutional prohibition as intruders or usurpers, rather than as *de facto* officers. When these cases were decided, the state constitution prohibited a person from holding *two* public offices, and the rules were clear about which office was lost when a person was in violation of the constitutional limitation. Since 1971, however, the constitution has permitted a person in a number of situations to hold two offices and prohibits him or her from holding a *third*. Whereas we earlier had a prohibition on *dual* office holding, we now have one on *multiple* office holding. One consequence of this constitutional change is that we no longer can be sure of the effect when a person assumes one office too many; there have been no cases that have reached the appellate level and therefore no opportunity for the courts to fashion an appropriate rule. If a person who legitimately holds two offices then qualifies for a third, does he or she vacate the first office assumed or the second; or, perhaps, does such a person simply never legally qualify for the third? We simply don't know, and this uncertainty creates the real possibility of disruption of settled legal expectations that the *de facto* officer doctrine is intended to avoid.

4. A city council member moves out of the city or out of his or her district. G.S. 160A-59 provides that when "any elected city officer ceases to meet all the qualifications for holding office pursuant to the Constitution, or when a council member ceases to reside in an electoral district that he was elected to represent, the office is ipso facto vacant." Most commonly this provision is triggered when a council member moves from the city or from the electoral district he or she represents. When that happens, the office is "ipso facto" vacant – that is, the office is vacated by action of law, at the moment the move occurs. Thus the situation is similar to that of a person who was in violation of the dual-office holding prohibition of the pre-1971 state constitution – taking a second office immediately and ipso facto vacated the first – and it might well be that a court would apply to a person who continued in public office in these circumstances the same rule applied to a person in violation of the dual-office holding prohibition: that he or she is a mere usurper and will not be accorded the status of a *de facto* officer.

David Lawrence is retired from the faculty of the School of Government. For questions about the subject of this blog post, please refer to our [list of faculty expertise](#) to identify the appropriate faculty member to contact.

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