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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

September 4, 2003

Thomas M. Boulware, Esquire
Post Office Box 248
Barnwell, South Carolina 29812

Dear Mr. Boulware:

You refer in your letter to a recently enacted amendment by the General Assembly to S.C. Code Ann. Sec. 7-13-190. The amendment, reflected in § 7-13-190(E)(3), makes applicable to municipal general elections as well as other elections significant changes in the State's election law, by restricting substantially write-in votes. Your concerns go to "the validity of the amendment and its application to [the] municipal elections for the City of Barnwell and the Town of Williston ...." You have enclosed an opinion from Danny Crowe, General Counsel for the Municipal Association, which questions the validity and constitutionality of the recent amendment to § 7-13-190(E)(3), and which you adopt as a request for an opinion to this Office.

Law / Analysis

The most recent amendment to § 7-13-190, which is set forth in 2002 Acts No. 3, provides as follows:

> (E)(1) A special election to fill a vacancy in an office is not required to be conducted if fourteen calendar days have elapsed since the filing period for that office has closed and:
>
> (a) only one person has filed for the office and
>
> (b) no person has filed a declaration to be a write-in candidate with the authority charged by law with conducting the election.
>
> (2) In such an event, the candidate who filed for the office is deemed elected and shall take office on the Monday following certification.
>
> (3) The provisions of this subsection also apply to municipal general elections.

> When no person has filed a declaration to be a write-in candidate pursuant to this section, the candidate who filed for the office must be declared the winner by the authority charged by law with conducting the election, and the votes for the election must not be counted or otherwise tabulated. Nothing in this section requires a ballot containing the name of the person who has been declared the winner pursuant to this section to be reprinted to delete the winning candidate's name or candidates' names from the ballot.

Mr. Crowe's legal memorandum terms the amendment to § 7-13-190 as representing "a radical departure from customary election procedures in the State and is constitutionally suspect." He concludes as follows:

> [m]y concerns on the constitutionality of the amendment involve two provisions of the State Constitution: Article 1, § 5 and Article 3, § 17. Article 1, § 5, and its predecessor section, have been cited and discussed in a number of previous Attorney General Opinions as providing a constitutional right to the availability of the write-in vote in general and special elections. Several of these opinions specifically have involved municipal elections. Enclosed are copies of the Opinions which I was able to locate on the issue in the context of municipal elections. These are dated March 21, 1961; July 29, 1963; March 23, 1987; July 15, 1991; March 25, 1997; and April 28, 1998. Obviously, the amendment to § 7-13-190 eliminates the election day opportunity for a voter to write-in his or her own name or the name of any other person for the municipal elected office.

In his legal memorandum, Mr. Crowe discusses the fact that "[s]everal Attorney General opinions also have stated that there are no state law requirements for filing by a write-in candidate." See, Ops. S.C. Atty. Gen., July 18,1960; July 9, 1964; June 15, 1966; July 12, 1966; September 29, 1970; October 15, 1974; September 13, 1976; October 1, 1976; and September 24, 1980. Moreover, he questions whether "the title of the Act can be said to fairly apprise the people of [the] subjects of the Act." Further, he concludes that the amendment will have the "unintended consequence" of disrupting "the manner in which municipalities now provide for those elected to take office." Finally, Mr. Crowe concludes that § 7-13-190 is not self-executing and that "[s]ince the amendment to § 7-13-190 did not expressly repeal § 5-15-70, my view is that a municipality should enact such an ordinance."

Initially, it must be noted that a statutory amendment is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).

Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent inequity or unconstitutionality, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997. Furthermore, pursuant to the constitutional principles of separation of powers it is well established that only the General Assembly can repeal a statute which it has enacted.

In addition, the United States Supreme Court has recognized that "voting is of the most fundamental significance under our election structure." Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979). Moreover, our own Supreme Court stated in State ex rel. Edwards v. Abrams, 270 S.C. 87, 240 S.E.2d 643 (1978) that "... the right of suffrage is a constitutional right vested in those who possess the qualifications prescribed in the constitution, and such right cannot be denied or abridged by legislative enactment." The Court in Abrams went on to add that the right to vote is "a right which the legislature may regulate under its plenary powers to any extent not expressly or impliedly prohibited by the provisions of the constitution."

Numerous opinions of this Office reflect the fundamental importance of the right to vote in South Carolina. We have consistently advised, for example, that a municipal election must be held even "where only the incumbents to said offices have qualified as candidates." Op. S.C. Atty. Gen., July 29, 1963. As we commented in that opinion,

> [a]s early as 1935 this office expressed the view that such elections must be held. This view was confirmed by Opinion No. 1063 dated March 16, 1961. The election must be held in view of the statutes relating to write-in votes and the Constitution which provides that any qualified elector is eligible to an office for which he may vote.

In an opinion of this Office dated April 28, 1998, we concluded that a Bill which provided that if the number of qualified candidates offering for an election to a school board is equal to the number of existing vacancies, the candidates must be deemed elected without an election, was constitutionally suspect. We noted that Article I, § 5 of the South Carolina Constitution states as follows:

> [a]ll elections shall be free and open, and every inhabitant of this State possessing the qualifications provided in this Constitution shall have an equal right to elect officers and be elected to fill public office.

In concluding that the Bill in question was constitutionally questionable, we stressed that, in our opinion, Article I, § 5 protects the right to write in the name of a candidate on the ballot. We explained by the following:

> [t]his Office has never addressed the applicability of Article I, Section 5 to a situation such as the one raised in your opinion request. However, we have applied this provision to other situations which provide guidance in analyzing your question On two occasions in the 1960's, this Office was asked whether an election must be held when the candidates for office were unopposed. On both occasions, this Office concluded that since Article 1, Section 5 provides that any qualified elector is eligible to an office for which he may vote, the elections must be held. Ops. Atty. Gen. dated July 29, 1963 and March 16, 1961. While not specifically stated therein, it is clear these opinions recognized that the right to write in the name of a candidate on the ballot is contained in Article 5, Section 1.
>
> In an opinion dated June 18, 1968, Attorney General McLeod discussed a statute which required a candidate defeated in the primary to pledge not to offer or campaign in the ensuing general election. Attorney General McLeod cited Gardner v. Blackwell, 167 S.C. 313, 166 S.E.2d 338 (1932), as authority for the proposition that all qualified electors are eligible to be voted upon for an office. Attorney General McLeod went on to state:
>
> > [Gardner] effectively recognized the right to be voted for even though one's name was not placed upon an official ballot. It recognized the validity of a write-in ballot prior to the incorporation in the official ballot form of a write-in space for candidates. The later provision was adopted in the early 1950's and merely had the effect of focusing attention on the constitutional right to write in the name of a candidate- a right which has always existed, but was not exercised merely because the attention of the voters was not directed to its existence.

Thus, based upon the foregoing authorities, we concur with Mr. Crowe's conclusion that the amendments to § 7-13-190 are constitutionally suspect. While other authorities hold that there is no federal constitutional right to a write-in vote, or uphold statutory limitations upon a write-in,[1] it

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[1] See, Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) [Hawaii's ban on write-in voting upheld]; Fulan v. Smith, 640 So.2d 1188 (Fla. Dist. Ct. App. 1994) [statute establishing deadline for filing oaths for presidential write-in did not impose unreasonable burden upon prospective candidates]; Chavez v. Hannah, 827 S.W.2d 100 (Ct. App. Tex. 1992) [statutes prohibiting counting of write-in votes for candidate who did not properly register 60 days before election does not violate federal or state Constitution]. But see, Smith v. Smathers, 372 So.2d 427 (Fla. 1979) [complete abolition of write-in voting violated the right to vote for a candidate of one's choice as guaranteed by the Florida Constitution]; Socialists Labor Party v. Rhodes, 290 F.Supp. 983

(continued...)

would appear that the above-referenced provisions of the South Carolina Constitution provide for the right to the availability of the write-in vote in general and special elections.

Conclusion

Like Mr. Crowe, we conclude that the amendments to § 7-13-190, which place severe restrictions on write-in voting and the counting of write-in votes, are constitutionally suspect. We concur with Mr. Crowe's legal memorandum questioning the constitutionality of these amendments.

It has long been the opinion of this Office that the right to write-in the candidate of one's choice is constitutionally protected by the Constitution of South Carolina. This right includes a write-in even on election day and where no write-in candidacy has been offered. As the Supreme Court of Florida has written in Smith v. Smathers, supra, quoting State ex rel. Lamar v. Dillon, 14 So. 383, 393-94, "... the legislature cannot, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be free to vote for whom he pleases, and the constitution has guaranteed to him this right." 372 So.2d at 428.

Of course, as stated above, only a court may declare the amendments to § 7-13-190 invalid. However, based upon the foregoing authorities and Mr. Crowe's memorandum, it is our opinion that these amendments are constitutionally suspect and a court may well declare them to be unconstitutional.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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[1](...continued)
(S.D. Ohio 1968) [statutory provision prohibiting write-in votes is a denial of equal protection of the laws].