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# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 27, 1997

The Honorable James L. M. Cromer, Jr.
Member, House of Representatives
310D Blatt Building
Columbia, South Carolina 29211

Dear Representative Cromer:

Your opinion request has been forwarded to me for reply. You ask for this Office's opinion as to the constitutionality of S.392. S.392 prohibits persons who lose in a primary or run-off election from serving in an office as a result of write-in votes received in the general election. Following research, I have concluded that while it is possible to bar persons who have participated in primaries and lost from serving at the state or a lower level following the next general election, the statute as written is probably unconstitutional, both for being violative of the federal constitution and for being overbroad.

One reason the bill probably is unconstitutional is it has the potential to impose additional requirements on candidates for federal office, an unconstitutional practice. The bill as written applies not only to candidates for office at the state and lower levels, but at the federal level as well. See e.g., Section 2, S.392 ("Every candidate for selection... for any office, United States Senator..."). While the United States Constitution clearly gives States the authority to prescribe the times, places and manner of holding elections for Senators and Representatives, States do not appear to have authority to impose on candidates for federal office requirements beyond those imposed at the federal level. See United States Constitution, Article I § 4, cl.1; Sugarman v. Dougall, 479 U.S. 189 (1986); Benesch v. Miller, 446 P.2d 400 (Alaska 1968). Disqualifying an otherwise qualified winner of a general election contest because he previously lost in a primary has the historically impermissible effect of adding the qualification that any primary entered must be won.

Deputy Attorney General Lottis

One case in which the condition imposed was found to be an impermissible condition, the case of Benesch v. Miller, dealt with a statute similar to the one proposed. The Benesch case involved an Alaska law which provided that all write-in votes for a person whose candidacy for the office had been rejected in a party primary the same year were invalid unless the party nominee had died, withdrawn, become disqualified, or been certified as incapacitated. See Benesch v. Miller, 446 P.2d 400 (Alaska 1968). The law was challenged when one of Alaska's sitting Senators was defeated in his primary and continued to want to run for office. Upon their consideration of the case, the Alaska Supreme Court struck down the law as violative of the federal constitution's qualification clause, finding that the legislature could not enact a law which would impose a categorical barrier to candidacy for federal office. In doing so, the court held that declaring all the write-in votes for the Senator invalid would have the direct effect of eliminating him as a candidate for United States Senator even though he remained qualified under the United States Constitution. The overall effect then would be to add to the qualifications established by the Constitution, an impermissible and unconstitutional act.

While the Benesch case appears still to be valid law, the federal candidate issue did not come up in a more recent United States Supreme Court decision, Burdick v. Takushi, 504 U.S. 428 (1992), which upheld a registered Hawaiian voter's challenge to a Hawaii law prohibiting write-in voting entirely. The state/federal candidate issue also was not considered in Storer v. Brown, 415 U.S. 724 (1974), a case in which the United States Supreme Court could have addressed the issue while evaluating the constitutionality of a California statute and did not. In the Storer case, the Court considered an attack on two California statutes providing that a candidate who has been defeated in a party primary may not be nominated as an independent or be the candidate of any other party in the general election. The Court upheld the statutes as constitutional, finding that the statutes worked as a means to restrict ballot crowding, as a method of prohibiting a candidate from continuing the struggle after losing the primary, and as a means to avoid a forum for continuing intraparty feuds. Id. at 735. The statutes thus furthered the legitimate state interest of reserving the general election ballot for major struggles and in so doing presented the public with more understandable choices in the general election. Because of the conflict between the Benesch case, which appears on point but is not a United States Supreme Court case, and Burdick and Storer, valid arguments could be made to support conclusions both that Senator Cork's proposed statute would be constitutional and that it would be unconstitutional, if applied to candidates for federal office.

A second problem with the bill is its breadth. The bill prohibits persons defeated in a primary or ensuring run-off election for any office from serving in that office as a result of write-in votes. Since the bill does not restrict itself solely to serving following the next general election, a logical interpretation would be the candidate is prohibited from

ever serving in the office. The argument is strengthened when one notes the original text of Section 7-11-210 makes reference to "the ensuing general election" and the new proposed language, which immediately follows, does not. Compare S.C. Code Section 7-11-210 and Section 2, S.392. If a court were to interpret the bill strictly, there is a good chance the could would strike it for being overbroad.

I hope the above information answers your questions. If you need copies of cases or further information, please let me know.

Sincerely,

Paul M. Koch

Paul M. Koch
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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