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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 28, 1998

The Honorable Eugene C. Stoddard
Member, House of Representatives
422B Blatt Building
Columbia, South Carolina 29205

RE: Informal Opinion

Dear Representative Stoddard:

You have asked for this Office's opinion regarding the constitutionality of S.402 of 1997. Constitutionality of the Bill will be considered following a discussion of the presumptions of constitutionality by which the courts and this Office are guided.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such 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 (1938); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

S.402 would amend Act 779 of 1988, as amended, relating to the Laurens County School Board of Trustees, to provide that if the number of qualified candidates offering for election is equal to the number of existing vacancies, the candidates must be deemed elected without an election being held.

Analysis of your question must begin with Article 1, Section 5 of the South Carolina Constitution. This section provides as follows:

> All 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.

This Office has never addressed the applicability of Article 1, 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.

As previously stated, S.402 provides that if the number of qualified candidates offering for election is equal to the number of existing vacancies, the candidates must be deemed elected without an election being held. In so doing, the Bill eliminates the opportunity for write-in votes in such a situation. This infringes upon one's right to write in the name of a candidate on the ballot. Therefore, in my opinion, S.402 is constitutionally suspect as violative of Article 1, Section 5. Of course, S.402 would be entitled to a presumption of constitutionality and would be enforceable until a court rules otherwise.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General