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The State of South Carolina

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May 16, 1991

The Honorable John Courson
Senator, District No. 20
601 Gressette Building
Columbia, South Carolina 29202

The Honorable Joe Wilson
Senator, District No. 23
606 Gressette Building
Columbia, South Carolina 29202

The Honorable David Thomas
Senator, District No. 8
602 Gressette Building
Columbia, South Carolina 29202

Dear Senators Courson, Wilson and Thomas:

You have asked "whether the South Carolina Senate can constitutionally bar Mr. [Eugene] Carmichael from serving if he is successful in the May, 1991 general election."

There are several constitutional provisions which are relevant to your question. Article I, Section 11 requires that each House of the General Assembly "shall judge of the election returns and qualifications of its own members ...." Article III, Section 12 provides that

> [e]ach house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time for the same cause.

Moreover, Article I, Section 8 mandates a separation of powers between the three branches of government. Based upon these provisions, as well as others, our Supreme Court has ruled that, except where constrained by an express provision of the Constitution, no other branch of government is permitted to adjudicate questions concerning the operations or procedures of either House of the General Assembly. See, Culbertson v. Blatt, 194 S.C. 105, 95 S.E.2d 218 (1940). Thus, it is clear from these provisions that this Office is constitutionally prohibited from ultimately resolving the question of whether or not the Senate should bar a particular member from serving. Obviously, such must be resolved by the Senate itself.

However, in order to assist you as much as possible, we have researched your question and offer the following authorities to you for consideration.

Article III, Section 11

As noted above, Article III, Section 11 of the State Constitution mandates that each House shall judge the qualifications of its members. A leading authority concerning constitutional provisions of this type is the United States Supreme Court decision of Powell v. McCormack, 395 U.S. 486 (1969). In Powell, the Court addressed the constitutional question of whether Congress could refuse to seat a member for misconduct where such member met the constitutional qualifications for House membership of age, citizenship and residence. The Court distinguished exclusion from membership from expulsion, stating that

> ... the distinction between exclusion and expulsion ... [is not] merely one of form. The misconduct for which Powell was charged occurred prior to the convening of the 90th Congress.

395 U.S. at 508. The Court concluded that the situation in Powell involved one of exclusion rather than expulsion. That being the case, the Court held that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the United States Constitution." 395 U.S. at 549. In the words of the Court,

> ... Adam Clayton Powell Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution ... [T]he House was without power to exclude him from its membership.

Supra.

It must be remembered that Powell involved interpretation of the federal Constitution as the Constitution relates to the federal Congress' role in judging the qualifications of its members. While Powell is the leading recent case in this area, nothing in Powell suggests that the intent of the holding of the case mandated that state legislatures must also be included in its holding. See, Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983) [Powell's view of the Qualifications Clause applies to Congress].

Moreover, there are other earlier cases which conclude that, either house of a legislative body possesses virtually unlimited authority pursuant to its power to judge the qualifications of its members; these cases conclude that, absent that body's violating a member-elect's constitutional rights, see, Bond v. Floyd, 385 U.S. 116, no court may second guess the legislative body's decision. For example, in State ex rel. Boulware v. Porter, 178 P.2d 832 (1919), the Court stated the following with respect to the constitutional authority of each house to judge the qualifications of its members:

> The authority thus recognized as lodged in each house is indispensable to its independence and existence. It emanates directly from the people to each house as an independent entity, and cannot be delegated or granted away. Each house acts for itself, and from its decision there is no appeal. No individual officer, court or other tribunal can infringe upon its exclusive prerogative to determine for itself and in its own way whether a person who presents himself for membership is entitled to a seat.

In addition, in Rainey v. Taylor, 143 S.E. 383 (1928), the Georgia Supreme Court construed the word "qualification" as used in a provision similar to Article III, Section 11. The Court noted that the word "qualification" normally means "[a]ny natural endowment, or acquirement which fits a person for a place, office, or employment, or enables him to sustain any character with success ...." The Court strongly suggested that the term "qualification" encompassed a somewhat broader meaning than simply legal eligibility, as Powell v. McCormack had held:

> We are of the opinion that the word 'qualifications,' as used in the constitutional provisions quoted, is not subject to the limitations which the definition taken from the dictionary referred to would seem to impose. The word 'qualification,' as thus used in the Constitution,

> seems to include also certain of the elements of 'eligibility,' ....
>
> These provisions last quoted would seem to relate as much to eligibility, or even more to that question, than to the question of qualification, if we accept the definition quoted above from the lexicon referred to.

It is evident from the above that the Court believed the word "qualifications" as used in the Georgia Constitution included not only legal eligibility, but "fitness" as well.

And in Hiss v. Bartlett, 3 Gray 468, the eminent Chief Justice Shaw of Massachusetts found that a provision authorizing each house to determine the qualifications of its members was sufficient to authorize a legislative body to expel a member for misconduct even where the Constitution contained no express expulsion power. The suggestion in this case is clearly that a Qualifications Clause goes beyond merely legal eligibility.

I am not aware of any South Carolina case interpreting Article III, Section 11 with regard to whether the Senate possesses the constitutional authority to refuse to seat an individual who otherwise possesses the constitutional eligibility to serve. As stated, in the final analysis, that is a matter for the Senate alone to decide. Powell v. McCormack, which holds that the Qualifications Clause is limited to legal qualifications, is the most often cited recent authority in this area and a South Carolina court could certainly find Powell persuasive if the case ever came before it. We would add, however, that Powell is not absolutely binding upon the South Carolina Supreme Court or, of course, the Senate itself. Moreover, there is, in addition to Powell earlier authority in other jurisdictions, that would appear to authorize the Senate to refuse to seat on grounds of suitability as well as eligibility.

Article III, Section 12

As noted above, there is one other constitutional provision which is relevant to your question. Article III, Section 12 provides in pertinent part that

> [e]ach house shall ... punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time for the same cause.

The general law regarding the authority of a legislative house to expel one of its members is set forth as follows:

> From the foundation of representative government in this country, it has been a general rule that the legislative body of a state has the inherent power to remove its speaker or other officers at will, unless inhibited from so doing by some constitutional or other controlling provision of law. Such body has the power also to expel a member .... A court ... cannot inquire into the reasons for expulsion or whether the member was duly heard before being expelled. The power of expulsion is a necessary and incidental power to enable the house [or Senate] to perform its high functions, and it is necessary to the safety of the house. It is a power of protection .... In short, the authority of the legislature in such a matter is well-nigh absolute, and the courts have no power to control, direct, supervise or forbid its exercise by either branch of the legislative department.

72 Am.Jur.2d, States, § 45.

The only question of which I am aware which has arisen concerning whether or not a legislative body possesses an absolute right to expel a fellow member is whether such conduct creating the cause for expulsion must not have occurred during a prior legislative session or Congress. This question was discussed extensively in Powell v. McCormack. See, 395 U.S. at 508-9. The issue is also dealt with in detail in Jefferson's Manual and Rule of the House of Representatives, Section 64, wherein it is stated:

> The power of expulsion in its relation to offenses committed before the member's election has been discussed ..., and in one case the Judiciary Committee of the House concluded that a member might not be punished for an offense alleged to have been committed against a preceding Congress ... but the House itself declined to express doubt as to power to expel and proceeded to inflict censure .... Both Houses have distrusted their power to punish in such cases ... However, the 96th Congress punished Members on two occasions for offenses committed during a

> prior Congress.... It has been held that the power of the House to expel one of its Members is unlimited; a matter purely of discretion to be exercised by a two-thirds vote, from which there is no appeal ... The resignation of the accused Member has always caused a suspension of proceedings for expulsion ....

Again, there does not appear to be any South Carolina Supreme Court case interpreting Article III, Section 12 in terms of whether any such limitation regarding when the alleged conduct occurred might be present. In addition, it is apparent from the language of Article III, Section 12 itself that the only limitation therein is that an expulsion may not be for the same cause previously resulting in expulsion. Moreover, In re Speakership, 25 P. 707, 710 (1891) in interpreting a similar constitutional provision stated:

> This grant of power is plenary, and except as otherwise provided in the constitution itself, is exclusive, and when exercised within legitimate limits, is conclusive upon every department of the government.

Thus, it appears that the authority of the Senate in this area is virtually absolute and should it so desire, the Senate upon 2/3 vote would have the authority to expel a sitting member of the Senate so long as such was not for the same cause as previous expulsion.

CONCLUSION

1. The South Carolina Senate possesses the exclusive authority to judge the qualifications of its members pursuant to Article III, Section 11 of the South Carolina Constitution. The Senate also possesses the exclusive authority to expel a member upon a vote of 2/3, so long as not for the same cause.

2. The courts distinguish between exclusion (the right not to seat a member, by majority vote) and expulsion (the removal of a member who has been seated, by a 2/3 vote). The cases also hold that a court may not interfere in a decision to exclude or expel unless such is for an unconstitutional reason (e.g. racial discrimination or First Amendment exercise).

3. While there is authority to the contrary, the United States Supreme Court decision of Powell v. McCormack, is the leading recent case in the area of a legislative body's decision not to seat a member (exclusion). This case limits Congress' authority to judge the qualifications of its members to the

legal qualifications of membership only. 1/ While there is no definitive South Carolina case interpreting the meaning of the term "qualifications" for purposes of Article III, Section 11, a South Carolina court is most likely to follow the Supreme Court's reasoning in Powell. 2/ But because Powell involved the authority of Congress rather than the General Assembly, neither our Court nor the Senate itself is absolutely compelled to follow Powell.

4. Therefore, the ultimate decision as to whether to seat or not to seat a particular member-elect of the Senate rests solely with the Senate itself.

5. The Senate also possesses the power to expel a member once seated, except where the cause for expulsion is the same as that for a previous expulsion, or except where the expulsion is for an unconstitutional reason [e.g. race discrimination or First Amendment reasons].

6. The ultimate decision as to whether to expel or not expel a member once seated rests solely with the Senate.

Sincerely yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
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1/ Article III, Section 7 of the State Constitution requires that a State Senator must be a duly qualified elector under the Constitution, must reside in the Senatorial district as designated by the General Assembly and must be at least 25 years of age.

2/ The thrust of the Court's reasoning in Powell is that a legislative body is "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." 395 U.S. at 522.