

The State of South Carolina



Office of the Attorney General

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The Honorable Carroll A. Campbell, Jr.
Governor of the State of South Carolina
Post Office Box 11369
Columbia, South Carolina 29211

Dear Governor Campbell:

Attorney General Medlock has referred your recent letter to me for reply. You have inquired if you may appoint someone to serve in place of a legislator who is called to active duty military service pursuant to South Carolina Code Ann., §§ 8-7-10 (3), 8-7-30 and 8-7-40. It appears that the referenced provisions provide you with that authority under the provisions of South Carolina Code of Laws, 1976.

Section 8-7-30 provide in part that

[t]he absence of any officer from his office or position caused by his being in military service shall not create a forfeiture of or vacancy in the office or position to which such officer was elected ... but shall be construed to create a temporary vacancy.

Section 8-7-40 provides in part that

[i]n case a temporary vacancy is created in any office or position by reason of the absence of the officer in the military service the appointive authority shall appoint some person to fill temporarily the office or position to which such officer was elected

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Section 8-7-10 (3) defines the "appointive authority" in regard to appointing a person to replace a State official as being the Governor with the advice of the Senate. The statute reads in pertinent part as follows:

(b) 'Appointive authority' means ... if the officer was elected to his office in a general election ... the Governor of the State, with the advice and consent of the Senate, if the officer is a State official or employee

It may be argued that the provisions of Section 8-7-10 et seq. violate the separation of powers doctrine of Art. I, § 8 of the State Constitution. However, our Supreme Court has noted in Crow v. McAlpine, 277 S.C. 240, 242, 285 S.E.2d 355 (1981):

The function of making or recommending appointments to public office does not necessarily or ordinarily belong to either the legislative, executive, or judicial branches of state government. Unless restrained by the Constitution, the General Assembly may provide for this power to be performed by any of the three branches of government.

In any event, Section 8-7-10 et seq. would be entitled to the presumption of constitutionality unless and until a court declares otherwise. The constitutionality of this particular legislation was apparently at least considered in an opinion dated June 18, 1942, enclosed, wherein former Attorney General John M. Daniel stated: "We have no decision passing upon the Constitutionality of this Act but no one feels disposed to question it since it is for the benefit of those who are seeking to take a more active part in the service of their country." See also Op. Atty. Gen. dated April 6, 1982 (wherein former Attorney General McLeod stated "there is authority for the argument that a Governor can appoint a temporary successor for any 'public office.'") (enclosed) and Art. V, § 18 of the State Constitution. Thus, while the question is not free from doubt, we believe Section 8-7-10 et seq. could withstand a constitutional challenge on the basis of separation of powers.

Of course, it should also be stated that Article III, Section 11 of the State Constitution expressly reserves to each house the ultimate authority to determine the qualifications of its own members. Our Supreme Court has previously recognized that pursuant to this provision, the qualifications of members of either the House or

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the Senate are respectively matters "wholly within the jurisdiction" of that house. Culbertson v. Blatt, 194 S.C. 105, 111, 9 S.E.2d 218 (1940). That being the case, while we believe that a court would find that such a temporary appointment made by the Governor is valid, it would, as in any other instance, remain a matter for each house to determine whether a particular member is seated. This is consistent with the previously quoted language in Crow v. McAlpine, supra, that specific provisions of the State Constitution (in this instance Article III, Section 11) must be given proper deference. Of course, this Office does not comment upon either the House or the Senate's decision in this regard.

It would appear that certain constitutional questions are raised in this instance. Accordingly, these issues would be best resolved in a spirit of cooperation and accommodation between the respective branches of government.

If I can be of further assistance, please inform me.


Very truly yours,



Edwin E. Evans
Chief Deputy Attorney General

EEE/an
Enclosures

REVIEWED AND APPROVED BY:



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