1984 WL 249829 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 14, 1984

***1** The Honorable Isadore E. Lourie
Senator
District No. 7
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Lourie:
By your letter of January 11, 1984, you requested an Opinion on the following question:
After a Joint Resolution to amend the Constitution of South Carolina has been properly adopted by two-thirds of the members of each house of the General Assembly but before the matters concerned in the Joint Resolution have been submitted to the qualified electors at the next general election can that Joint Resolution be amended, and if so, what votes by the General Assembly would be required to accomplish such amendment?

For purposes of answering your question, we will assume that the proposed amendment of the Joint Resolution occurs sometime during the second year of the legislative session, but within the same two year session of the General Assembly as the original Joint Resolution. The answers to your questions are not free from doubt, as we have found no judicial precedent in the State of South Carolina for guidance. There is, however, legislative precedent for such amendment by the General Assembly of South Carolina. Based on legislative precedent and other considerations examined in the following discussion, this Office would advise that a court of this State would probably conclude that a Joint Resolution to amend the Constitution of South Carolina, having been properly adopted, may be amended before its submission to the qualified electors in the next general election.

I.

Amendments to the Constitution of South Carolina may be made by either the legislative process or by the convening of a Constitutional Convention. Proposal and ratification of constitutional amendments by the Legislature is not considered the exercise of ordinary legislative functions. Moffett v. Traxler, 247 S.C. 298, 147 S.E. 2d 255 (1966). Article XVI, Section 1 of the Constitution contains the following provisions for amendment by legislative process, wherein the General Assembly proposes and ratifies a constitutional amendment:
Any amendment or amendments to the Constitution may be proposed in the Senate or House of Representatives; provided, however, that for the general elections in 1970, 1972, 1974, 1976, 1978, 1980 and 1982 revision of an entire article or the addition of a new article may be proposed as a single amendment with only one question being required to be submitted to the electors. Such amendment may delete, revise and transpose provisions from other articles of the Constitution provided such provisions are germane to the subject matter of the article being revised or being proposed. If the same be agreed to by two-thirds of the members elected to each House, such amendment or amendments shall be entered on the Journals respectively, with the yeas and nays taken thereon; and the same shall be submitted to the qualified electors of the State, at the next general election thereafter for Representatives; and if a majority of the electors qualified to vote for members of the General Assembly, voting thereon, shall vote in favor of such amendment or amendments, and a majority of each branch of the next General Assembly shall, after such election, and before another, ratify the same amendment or amendments, by yeas and nays, the same shall become part of the Constitution; Provided, that such amendment or amendments shall have been read three times, on three several days, in each House.

***2** There must be strict observance of every substantial requirement of this amendatory process. Moffett v. Traxler, supra. On the other hand, a mere technical construction of these requirements is to be avoided. Thompson v. Livingston, 116 S.C. 412, 107 S.E. 581 (1921). While there is no specific provision for amending a Joint Resolution proposing a constitutional amendment, Article XVI, Section 1 contains no express prohibition against such amendment. Moreover, none of the cases interpreting Article XVI of the Constitution has reviewed that Article in terms of a situation in which a Joint Resolution proposing a constitutional amendment was itself amended prior to its submission to the qualified electorate of this State. [1]

However, in at least three instances in the past, the General Assembly has amended duly enacted Joint Resolution proposing constitutional amendments before the same could be submitted to the voters in the next general election as required by Article XVI, Section 1. Our Supreme Court has stated that past legislative practice or a legislative construction placed upon a doubtful constitutional provision is entitled to great weight and consideration and raises a strong presumption that the construction is correct. Thompson v. Livingston, supra. Evidence of previous legislative construction is found in the following three instances.

On April 30, 1947, the General Assembly by Joint Resolution No. 588, 1947 Acts and Joint Resolutions, stated in Section 3:
That a Joint Resolution of the General Assembly of South Carolina, 1947, entitled 'A Joint Resolution to Amend Section 5, Article X of the Constitution, Relating to Bonded Indebtedness of Counties, Townships, Etc., By adding a Proviso Permitting the County of Williamsburg to Incur Bonded Indebtedness to an Amount Not Exceeding (18%) Per Centum of the Assessed Value of all Taxable Property, Provided, the Additional Per Cent. Shall Be Used For School Purposes', bearing Senate No. 43 and House No. 113, and Ratified March 20, 1947, be, and the same is hereby repealed.

Likewise, Joint Resolution No. 1441, 1970 Acts and Joint Resolutions, was approved May 1, 1970. Its title indicated the action-taken by the Legislature:
A Joint Resolution To Repeal A Joint Resolution of 1970 Bearing Ratification No. 1036, Which Proposed An Amendment To Section 5 of Article X of The Constitution of South Carolina, 1895, So As To Permit The School District of Kershaw County To Increase Its Bonded Indebtedness.

Finally, the most recent instance in which the General Assembly amended a Joint Resolution proposing a constitutional amendment occurred in Joint Resolution No. 1893, 1972 Acts and Joint Resolutions, ratified on July 28, 1972. Its title read:
A Joint Resolution To Amend A Joint Resolution of 1972 Bearing Ratification No. 1694, Relating To A Proposed Constitutional Amendment To Permit School District No. 5 Of Richland And Lexington Counties To Incur Bonded Indebtedness Up To Seventy-Five Percent Of The Assessed Value Of The Taxable Property Therein, So As To Provide That Such Indebtedness Shall Be Excluded From The Limitation Of Aggregate Indebtedness Upon Any Territory In The District; And To Amend The Title To Conform.

***3** The foregoing itself represents 25 years of consistent legislative practice, and, absent evidence otherwise, it may be presumed that this legislative practice has continued and was in effect even earlier. See, 7 A.L.R. 3d, § 4, p. 1308-1314; 2 Wigmore, Evidence, § 437 (Chadbourn rev. 1979). This continuous historical practice cannot be ignored, especially where our Supreme Court presumes that the General Assembly in discharging its duties in amending the Constitution acted in the required manner. Duncan v. Record Publishing Co., 145 S.C. 196, 143 S.E. 31 (1928). To do otherwise, would enhance the possibility of the Court's having to declare unconstitutional amendments to the Constitution which have been accepted and acted upon for years. See, Thompson v. Livingston, supra. [2]

Permitting the General Assembly to reconsider or amend a Joint Resolution would also follow the general principles stated in 16 C.J.S. Constitutional Law, § 9:
Prior to ratification by the people, a proposed legislative amendment is of no effect whatever, and it may be amended before submission for ratification. So, the legislature may reconsider its action on a constitutional amendment and it may recall its

bill proposing a constitutional amendment from the secretary of state for further consideration and amendment, while it is still in session.

This principle of 'no effect' is arguably strengthened by the provision in South Carolina that a Joint Resolution to amend the Constitution must be ratified by the General Assembly after submission to the voters before it becomes effective. Thus, amendment should be permitted since the Joint Resolution would presently be of no effect.

In addition, other jurisdictions considering the same issue have concluded that amendments may be made to similar resolutions proposing constitutional amendments prior to submission to the electorate. The Maryland Court of Appeals, that state's highest court, applied constitutional language substantively similar to South Carolina's Article XVI in ruling that an amendment of a bill or joint resolution proposing a change in the Constitution could be made by the same Legislature that originally offered the change because prior to a vote by the electorate, the proposed constitutional amendment has no weight and is of no effect. Bourbon v. Governor of Maryland, 258 Md. 252, 265 A. 2d 477 (1970). The Supreme Court of Alabama, in Doody v. State ex rel. Mobile County, 233 Ala. 287, 171 So. 504 (1936), ruled that the Alabama legislature had the right to reconsider the proposed constitutional amendment before the bill reached the final custodian (Secretary of State) and while the legislature is still in session. That court stated that

as to legislative details the rule has been adopted that if the constitutional requirements are met 'in substance and legal effect' it will suffice. 'To hold otherwise would subordinate substance to form, the end to the means, and this, we think, the framers of the Constitution did not intend.' There may be 'a substance in form even [.]'

***4** [Citations omitted.] And, in In Re Senate Concurrent Resolution No. 10, 137 Colo. 491, 328 P. 2d 103 (1958), the Supreme Court of Colorado, without giving its reason therefor, stated that the General Assembly of Colorado did have authority to amend a concurrent resolution proposing a constitutional amendment, prior to submission of the proposed amendment to the people. See also, State ex rel. Slemmer v. Brown, 34 Ohio App. 2d 27, 295 N.E. 2d 434, 436 (1973) [dicta].

Thus, the answer to your question certainly is not absolutely clear, particularly because judicial precedent within this State is lacking. [3] Nevertheless, we would advise that, based upon past legislative precedent and the reasoning of courts in other jurisdictions, a court would probably conclude the General Assembly could, within the same two year session, amend a Joint Resolution proposing a constitutional amendment before it is submitted to the qualified electors of this State in the next general election. [4]

II.

You have also inquired as to what votes by the General Assembly would be required to accomplish such amendment to a Joint Resolution proposing to amend the Constitution. Article XVI, Section 1, quoted supra, sets forth the procedural requirements to enact a Joint Resolution proposing a constitutional amendment but contains no requirements as to the procedure to amend a Joint Resolution. It would thus be appropriate to examine the procedures utilized by the General Assembly in the three instances in which that body amended Joint Resolutions proposing constitutional amendments, supra. [5]

An examination of Joint Resolution No. 1893 (R. 1937, H. 3687), 1972 Acts and Joint Resolutions, reveals that it was introduced in the House of Representatives (H.J. 2814); received approval by the required two-thirds majority on second reading, the yea and nay votes being recorded by name (H.J. 2854-6); and was read a third time and sent to the Senate (H.J. 2936). In the Senate, the Joint Resolution was introduced (S.J. 2130); received approval by the required two-thirds majority on second reading, the yea and nay votes being recorded by name (S.J. 2184); and was read a third time and enrolled (S.J. 2208). Upon passage by both Houses, the Joint Resolution was ratified (H.J. 3165, S.J. 2311). Each of the three readings in each House occurred on three separate days.

Similarly, Joint Resolution No. 588 (R. 294, S. 447, H. 658), 1947 Acts and Joint Resolutions, was enacted. The only procedural difference noted in examining the House and Senate Journals occurred in third reading in the Senate (S.J. 640). As for second reading in the Senate, a yea and nay vote was taken and recorded by name for third reading, with the notation that the required two-thirds majority vote required for passage was obtained. Each of the three readings in each House occurred on three separate days.

Joint Resolution No. 1441 (R. 1405, H. 2845), 1970 Acts and Joint Resolutions, offers less guidance than the two preceding Joint Resolutions. While it is apparent from the House and Senate Journals that the Joint Resolution was read in each House three times on three separate days, no yea and nay votes were reported by name, and no specified majority of votes required for passage was noted.

***5** Again, past practice is to be given great weight. Weeks v. Ruff, 164 S.C. 398, 162 S.E. 450 (1932). The validity of any of the proceedings utilized by the General Assembly to amend the Joint Resolutions proposing constitutional amendments noted above does not appear to have been challenged. Absent a showing that the requirements of Article XVI, Sections 1 and 2, to amend or enact a Joint Resolution have not been complied with, a court will presume that the duties and requirements have been discharged in a manner required by the Constitution. Duncan v. Record Publishing Company, supra. Thus, it is the opinion of this Office that a court would probably conclude that the same procedures utilized by the General Assembly in amending previous Joint Resolutions could be utilized again if the General Assembly desires to amend a Joint Resolution prior to its submission to the qualified electors of this State. In summary, the procedure would be three readings on three separate days in each House, with yea and nay votes recorded by name on second reading in each House, with a two-thirds majority required for passage.

Of course, any opinions expressed herein only represent the view of this Office that the General Assembly probably possesses the authority about which you have inquired. (Again, the answers to your questions are not free from doubt, as we have found no judicial precedent in the State of South Carolina for guidance.) It would be inappropriate, however, for this Office to take any position concerning the actual exercise of this authority by the General Assembly. See, Article I, Section 8 and Article III, Section 12, Constitution of South Carolina, 1895 as amended. I trust that the information provided herein will offer sufficient guidance to the General Assembly if that body chooses to amend a Joint Resolution proposing to amend the Constitution prior to its submission to the qualified electorate of this State. If we may further clarify the matter, please so advise us.

Sincerely,

Patricia D. Petway
Staff Attorney

Footnotes

1 We have also examined the Journals of the Constitutional Conventions of 1868 and 1895 for purposes of determining the intent of the framers of Article XVI, § 1 on this question; however, no helpful information evidencing such intent is contained therein.

2 It should be noted by way of comment that we have found no instance where the General Assembly has attempted to amend or repeal a Joint Resolution proposing a constitutional amendment in a different year of the same legislative session. However, since each of the proposed legislative changes, cited above, occurred during the same session of the General Assembly, any absence of precise legislative precedent, would not, we believe, in this instance be significant.

3 The General Assembly may with to consider that the courts in South Carolina have consistently stated that requirements delineating the amendatory process are mandatory and should be strictly construed. Moffett v. Traxler, supra. Accordingly, it could be argued that since no express authority exists, any amendment of the Joint Resolution is prohibited, in view of the fact that the General Assembly is not acting in this instance in a truly legislative sense. Moreover, we note that our Supreme Court has stated that repeated violations of a constitutional provision by the General Assembly do not amend the particular constitutional provision so as to authorize the Legislature's action. Scroggie v. Bates, 213 S.C. 141, 48 S.E. 2d 634 (1948). However, these arguments do not appear to be consistent with the authorities cited from other jurisdictions or with the principle that great deference is given by our Supreme Court to past legislative practice concerning the amendatory process.

4 We express no opinion herein as to the validity of amendment or repeal of a Joint Resolution to change the Constitution where such amendment or repeal is made by a different General Assembly from the one originally proposing the change in the Constitution. See, In Re Op. of the Justices, 155 So. 2d 329, 330 (Ala. 1963).

5 Article III, Section 18 of the Constitution and the Joint Rules of the General Assembly provide procedures to enact, and hence amend, legislation, but it should be remembered that the General Assembly in this instance is not acting in a legislative capacity and is therefore not subject to ordinary legislative rules. See Moffett v. Traxler, supra; Fleming v. Royall, 145 S.C. 438, 143 S.E. 162 (1928); Kalber v. Redfearn, 215 S.C. 224, 54 S.E. 2d 791 (1949); 16 C.J.S. Constitutional Law § 9.

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