1977 S.C. Op. Atty. Gen. 70 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-77, 1977 WL 24419

Office of the Attorney General

State of South Carolina
Opinion No. 77-77
March 9, 1977

***1** Honorable Solomon Blatt
Speaker
House of Representatives
State House
Columbia, South Carolina

Dear Mr. Speaker:
You have requested that we advise you as to whether or not a failure of the State House of Representatives to vote viva voce upon the election of committee members without securing the unanimous consent of the House members present would violate Article III, Section 20 of the South Carolina Constitution. We understand that the House, without, we are given to assume, either expressly or impliedly obtaining unanimous consent to vote other than viva voce, recently elected five members to a committee by using paper ballots which did not bear the signatures or names of the Representatives who voted in that election.

Article III, Section 20 of the State Constitution provides as follows:
In all elections by the General Assembly or either House thereof, the members shall vote 'viva voce', except by unanimous consent, and their votes thus given shall be entered upon the Journal of the House to which they respectively belong.

Although some twenty-six states either have or have had the same or a similar constitutional provision, none of them, including South Carolina, has ever had it construed.

The North Carolina Supreme Court has, however, construed a constitutional provision that required 'yeas and nays' to be taken during the enactment of legislation and to be entered upon the journal. See, Board of Com'rs of Stanly County v. Snuggs, 121 N.C. 394, 28 S.E. 539 (1897). Compliance with that requirement, the North Carolina Supreme Court held, was essential to a statute's validity.

Moreover,
. . . it is said . . . that courts usually hesitate to declare a constitutional provision is directory merely, in view of the tendency of legislatures to disregard provisions which are not declared to be mandatory; and that accordingly it is the general rule to regard constitutional provisions as mandatory, and not leave the matter to the will of the legislature to obey or disregard them. It is said, further, that this presumption as to mandatory quality is usually followed unless it is unmistakably manifest that the provisions were intended to be directory merely. Annot., 95 A.L.R. 278 at 284 (1935).

In our view, Article III, Section 20 is manifestly and unmistakably mandatory; thus, any election conducted by the General Assembly or a House thereof which is not conducted viva voce is void unless unanimous consent to conduct the election otherwise was obtained.

We would add, however, that any person unconstitutionally elected by the House to a committee and serving thereon would have at least de facto status. Cf., State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967).

Best wishes,

C. Tolbert Goolsby, Jr.

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