1993 WL 841143 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 18, 1993

*1 The Honorable Darrell Jackson
State Senator
2936 Dell Drive
Columbia, South Carolina 29209

Dear Senator Jackson:
You have requested our opinion concerning the legal authority for removal of the Confederate Battle Flag atop the State House. You question whether the Battle Flag is the flag contemplated by H.2261 of 1962, the Concurrent Resolution which purports to authorize the flying of the flag on the State House dome. You also inquire whether the State House Committee would, pursuant to S.C. Code Ann. §§10-1-40 and 60-12-90, possess the authority to remove the Battle Flag as a proposal regarding an alteration of the State House.

CONCLUSION

It is our opinion that there currently exists no binding legal authority to fly the Confederate flag on the State House dome. The State House Committee not only possesses the legal authority to retire the flag, but in the absence of any affirmative authority to the contrary, that Committee should do so, because no current, binding authority exists to continue flying it.

History of the Confederate Flag Atop the State House

Before detailing the events surrounding the placement of the Confederate Battle Flag atop the State House in 1962, it is helpful to go back to an even earlier date -- the 1950's. In 1954, the United States Supreme Court decided the landmark case of Brown v. Board of Education, requiring the desegregation of previously racially segregated schools. This decision as well as other civil rights efforts produced a firestorm of protest throughout the South. The State Senate adopted S.749 in 1956, a Senate Resolution providing for "The draping of the Battle Flag of the Southern Confederacy in the Chamber of the Senate." The Battle Flag was removed from the Senate chamber many years later, but its placement there in 1956 was clearly an act of defiance which was typical of the South's reaction at the time. It is important to note, however, that the State of South Carolina did not at this time place the Battle Flag atop the State House.

The scene then shifts to several years later and to South Carolina's celebration of the Civil War Centennial -- as part of a national celebratory effort. In 1959, the General Assembly created the South Carolina Confederate War Centennial Commission. Representative John May of Aiken, known in South Carolina as a prominent Civil War historian, was named Chairman of the Commission. Several other prominent citizens were also named. The Commission was given the authority to plan and coordinate the State's celebration of the Civil War Centennial.

The Commission produced a number of proposals for the celebration over the next several years. For example, in January 1962, the Commission recommended that a fountain be erected in the rotunda of the State House as a memorial of the women of the Confederacy. In 1963, Representative May presented to the members of the House from the Centennial Commission a Confederate Battle Flag. In addition, a Battle Flag was presented to each member of the Senate on behalf of Representative May and the Commission. In 1964, Representative May proposed and the General Assembly adopted a Concurrent Resolution requesting the National Park Service to authorize the Centennial Commission to erect a flagpole at Fort Sumter and to provide for the flying of this Confederate Flag thereon.

*2 Thus, it can be seen that these events, unlike the 1956 Resolution, were primarily acts of celebration, rather than symbols of defiance. They all occurred during the height of the Centennial, and it is clear that, rather than binding authority, they were recommendations or mere gestures of celebration.

Likewise, on February 14, 1962, Representative May introduced a Concurrent Resolution in the House regarding placement of the Confederate Flag on the State House. In the Resolution, it was "requested" that the Director of the Division of Sinking Fund and Property" have the Confederate Flag flown on the flagpole on top of the State House. While the 1956 Senate Resolution dealing with placement of the flag in the Senate had specifically stated a sense of permanence in placement of the flag, had even specified a procedure for purchase of the flag, and had spoken of its "installation", the 1962 Concurrent Resolution in no way did that. Instead, the 1962 Resolution simply "requested" the Sinking Fund Director to "have the flag flown on the flagpole on top of the State House." Nor did the 1962 Resolution specify that the flag be a Confederate Battle Flag as the 1956 Senate Resolution had done.

Thus, it is likely that the 1962 Resolution was originally intended merely as a request for a gesture of celebration of the Centennial just as the other efforts previously discussed were -- without regard to permanence in the placement of the flag or without recognition of any subsequent controversy such a gesture might cause. The Resolution received virtually no discussion in either house of the Assembly and appears to have gotten almost none in the media. By contrast, the fact that at about the same time, the American flag and State flag were returned to the State House dome for the first time in 10 years did receive prominent media coverage and attention.

The 1962 Resolution was quickly adopted in March 1962 and one historian has recorded that the Flag was flying atop the State House that very same month, although this is difficult to independently verify. In any event, subsequent pictures taken that same year do show the flag flying and the 1963 Legislative Manual contained a cover photograph of the State House showing the American Flag, State Flag and the Confederate Battle Flag atop the dome. Ironically, while the Battle Flag was long ago removed from the Senate without controversy, even though its placement there had been as a symbol of defiance, there has been much controversy regarding the flag's removal from the State House dome, even though it was placed there simply to celebrate the Centennial.

The State House Committee

The State House Committee was established pursuant to §10-1-40, the duties of which are "to review all proposals for alterations and/or renovations to the State House. No alterations or renovations shall be undertaken without approval of this Committee."

*3 Then by Act No. 503 of 1992, a major addition of authority to the Committee was added. Section 60-12-90 provides in part that "[t]he policy and decision of the State House Committee, with regard to any proposal for the administration of any project or program for the maintenance, alteration or renovation of the State House...shall be final." This latter addition of authority was made effective just this past July.

An alteration is a change which varies some ingredient or detail without destroying the original thing or substituting an entirely new thing, Hamilton v. Link-Hellmuth, Inc., 146 N.E.2d 615 (Ohio 1957), or a change which causes an object to be different in some particularly characteristic without changing the object into something else, Callahan v. Ganneston Park Dev. Corp., 245 A.2d 274 (Me. 1968), or a change in the superficial details of an existing structure so that identity is not destroyed. Paye v. City of Grosse Pointe, 279 Mich. 154, 271 N.W. 826 (1937).

Removal of the Confederate Flag, or Battle Flag, from atop the State House would fit within the definitions given to "alteration" in that neither the State House itself nor its identity would be destroyed, and only one particular detail would be changed by removal of the flag. The appearance of the State House would be changed only slightly. It is interesting

to note that at least one previous attempt to remove the flag from the State House requested that such be effectuated by the State House Committee. See H.3747 of 1978. Thus, it is our opinion that the State House Committee possesses the authority to remove the flag.

The Present Legal Authority to Fly the Flag

As stated earlier, the authority purporting to place the flag on top of the State House, H.2261, was couched in precatory language. The Concurrent Resolution specified no permanence and was adopted in the context of a Centennial celebration which by law, ended in 1966. See, Joint Resolution No. 313 of 1959. Thus, it is our opinion that the Resolution did not intend to permanently place the flag on the State House and did not originally intend to do anything other than pay tribute to the 100th anniversary of the Confederacy.

The non-binding nature of the authority used to place the flag on the State House is consistent with this original intent. Representative May, as scholar, used a Concurrent Resolution, not a bill. By contrast, the State Flag had been permanently erected on the State House dome by a statute. See, §10-1-160 [The State flag shall be displayed daily, except in rainy weather, from a staff upon the State House. The State Budget and Control Board shall purchase a suitable flag and cause it to be displayed, the expense to be borne out of funds provided for maintenance."] The comparison of the two is striking. The statute placing the State Flag is written in mandatory language ["shall"], expresses permanence and continuity ["daily, except in rainy weather"] and leaves no doubt that it is to be carried out ["the Budget and Control Board shall purchase a suitable flag and cause it to be displayed"].

*4 It is clear that, legally speaking, a concurrent resolution does not have the force and effect of law. As we stated in an opinion issued June 17, 1987,

Resolutions are of three kinds: simple, concurrent, or joint. It is frequently said that the distinction between bills and resolutions is that resolutions are not law.

We also commented that a concurrent resolution is "merely a simple resolution which is passed by both houses of the legislature."

It is commonly used to create special committees, the express recognition for meritorious service, to extend sympathy, and to express opinions to another governmental body. [Emphasis added].

We also added that

In the current practice, concurrent resolutions have been developed as a means of expressing fact, principles, opinions and purposes of the two houses.

It was stated in 73 Am.Jur.2d, Statutes, §3

a joint or concurrent resolution is not a statute, does not have the force or effect of law and cannot be used for any purpose for which an exercise of legislative power is necessary.

Even though legislative resolutions are entitled to deference and respect, they are not law. While a concurrent resolution may bind the members of the legislative body, they are not statutes and do not have the force and effect of law. State ex. rel. Barker v. Manchin, (W.Va.), 279 S.E.2d 622 (1981). Morever, a concurrent resolution binds only the particular Legislature which enacts it and not future ones. Dickinson v. Johnson, 176 S.E.2d 116 (Ark. 1915). Resolutions are but temporary measures and die when the subject matter is completed. 1992 S. C. Legislative Manual, page 252.

The June 17, 1987 Opinion

In 1987, we discussed the legal efficacy of H.2261 at great length. In response to the question of whether the Governor or Budget and Control Board could legally remove the flag, we concluded that this Concurrent Resolution does not have the force and effect of law, but carries great weight vis a vis a coordinate branch of government such as the Executive Branch. The doctrine of separation of powers was discussed at great length. The question of the authority of the State House Committee was not raised. In other words, we concluded that neither the Governor, nor the Budget and Control Board , possesses any independent authority to remove the flag, even though the Concurrent Resolution placing the flag on the State House was itself legally ineffective. In short, two wrongs do not make a right.

However, since that opinion was issued, Act No. 503 of 1992 was enacted, giving the State House Committee, a legislative committee, the final authority over alterations to the State House. As we concluded above, this is where the legal authority to deal with the flag as it relates to the State House now definitively rests, in the absence of the General's Assembly's modification of such authority. No further separation of powers problems remain. In the absence of any affirmative authority to the contrary, from either the Committee or the General Assembly, therefore, we conclude that the Committee should remove the flag which lacks any current binding legal authority to fly.
Sincerely yours,

*5 T. Travis Medlock

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