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SCCRC 1966-1969 Document 19: Daniel R. McLeod, Attorney General, State of South Carolina, to Robert H. Stoudemire, Staff Consultant, Bureau of Governmental Research and Service, University of South Carolina, October 2, 1967, with enclosure: Comments on Provisions of Articles I, II and XIV, Constitution of 1895

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October 2, 1967

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Dear Bob:

In connection with the proposed amendment of Article I, Section 16, relating to search and seizure, I feel that the proposal to expand the provision to protect against invasion of privacy is an appropriate one. The proposal relates to interception of communication which is generally done by electronic means.

Another additional factor may be taken into consideration and that is the apparent necessity for protection of privacy in areas such as information gotten through data processing. This has come to the attention of a number of states, wherein it is clear that massive collection of data by governmental agencies may afford a basis for concluding that the citizens right of privacy can be jeopardized. A preliminary discussion in the office of the Governor indicated that there may be some need for protection, particularly in such matters as income tax, health and public welfare. The need to formulate a decision as to what information should or should not be made available under a multitude of circumstances is clearly dictated if privacy is to fulfill its function in our democratic society. We are considering now the establishment of a system of data processing which would make readily available vast amounts of information relating to the private affairs of citizens. Unless thought is given to protection of the individual's privacy within the bank of information stored in the computers, there can be a potential invasion of that individual's right of privacy. The matter can be handled by

statutory enactment, but constitutional protection is indicated. Admittedly, the field is new and complex and the problems cannot definitely be foreseen, but there is a definite trend toward securing individual privacy in the field of data processing. I would suggest that consideration be given to the use of general phraseology such as "protection against unreasonable invasion of the individual's right of privacy."

Additionally, I feel that constitutional amendment is necessary to meet the problem posed by recent decisions of the United States Supreme Court relating to what may be termed administrative searches. These involve health, fire and zoning inspections and similar procedures. My thoughts on this are set forth in the attached memorandum.

Insofar as Article I, Section 28, I agree that the amendment can properly be phrased as set forth in your letter of September 19.

With respect to the consideration that Article XIV, be eliminated, I urge that it be retained. In view of the present state of litigation concerning title of the State to certain lands, its omission might be construed to mean a departure from the previous course of decisions. The declarations set forth in the Article may be self-evident and inherent, but their inclusion could only be a reaffirmation of an established law; whereas the exclusion of the Article could be seized upon as meaning that precedent may be questioned. In short, retention of the Article can do no harm, but omission may be detrimental. I agree, however, that the probabilities are that the Article would be considered merely a declaration of established inherent principles.

With all best wishes,

Very truly yours,

Daniel R. McLeod
Attorney General

DRM/mn

Enclosure

COMMENTS ON PROVISIONS OF ARTICLES I, II AND XIV
CONSTITUTION OF 1895

ARTICLE I, SECTION 16
Searches and Seizures

The decision of the United States Supreme Court in See vs. Seattle, 87 S. Ct. 1737 and Camara vs. Municipal Court, 87 S. Ct. 1727, now require that inspection of premises for such purposes as health, zoning, fire and other similar governmental purposes must be made by search warrant where there is a denial of entry by the person in possession. This raises the problem of what constitutes probable cause in such inspections. The Supreme Court has stated that knowledge of probable cause is not fatal to a valid search; in short, that an inspecting official need not have grounds to believe that violation of a health, zoning, or fire code exists in order to procure a warrant of search. There is no present authority for the issuance of such warrants, but this can easily be remedied by a statutory enactment. The constitutional provision, however, has been framed to meet the tests of probable cause in criminal cases only. If officials authorized to issue search warrants may issue warrants only on showing of probable cause, the effect of this can be to nullify the effectiveness of routine inspections of the type referred to. On the other hand, if some form of cause is not required to be shown, the issuance of search warrants can become a mere pro forma, perfunctory procedure.

It would appear desirable to provide language which would provide for the issuance of search warrants in instances where the purpose of the search warrant is not in aid of the

enforcement of criminal statutes. The criteria upon which such warrants may be issued could be left to the determination of the Legislature. Appropriate language might be:

> "Warrants issued in the execution of laws relating to the general health, safety and welfare shall be issued upon such cause as the General Assembly shall by law determine."

ARTICLE I, SECTION 17

The provision relating to the prosecution of crimes without indictment when the punishment for such crimes is less than $200 or imprisonment for less than 30 days may present a problem if magisterial jurisdiction is again raised as it was in 1963. In the preceding year, Article V, Section 21 of the Constitution was amended so as to provide for magisterial jurisdiction of $200. Overlooked at that time was the requirement that prior provisions of the Constitution required indictment when the punishment exceeded $100. Accordingly, the first amendment was ineffective until the provisions of Article I, Section 17 could be amended to coincide with Article V, Section 21.

It appears to be appropriate to suggest that the penalty for which prosecution may be made without indictment, be left subject to the discretion of the General Assembly, and to require that it enact laws providing the controlling penalties. At the same time, similar provisions may well be adopted with respect to the jurisdiction of magistrates, so as to permit the General Assembly to fix criminal jurisdiction from time to time. See Art. V, Sec. 20. Jurisdictional penalties would, in this view, be subject to fixation by the General Assembly rather than by constitutional amendment. The problem may not present itself, but in view of the general scrutiny of the magisterial system, it is likely that a revamping of their jurisdiction will occur.

ARTICLE I, SECTION 19

The provision of this Section prohibiting punishment for contempt to extend to imprisonment in the State Penitentiary is of no apparent value. I am aware of two cases where punishment for contempt was extended to the State Penitentiary. In one instance the trial judge corrected his sentence, and in the other the sentence of contempt was served in the Penitentiary and is now the subject of a habeas corpus petition. In present day circumstances, punishment in the State correctional institutions is in many instances preferable to service in county or city jails. In either event, the stigma of imprisonment for contempt is not likely to be affected by the place where service of sentence is made.

I suggest the deletion of the last sentence of this Section relating to imprisonment for contempt.

ARTICLE I, SECTION 28

I urge that this Section be retained, particularly, so much thereof as declares that "All navigable waters shall forever remain public highways free to the citizens of the State and the United States--." The remaining portions may be of slight significance. The omission from the declaration quoted may be construed to recognize the relinquishment by the public of free access to the waterways.

ARTICLE II, SECTION 2

"But no person shall hold two offices of honor and profit at the same time." This provision is the source of many problems.

While the provision against dual office holding precludes desirable service in many instances, the basic reason for the provision appears sound in present day circumstances.

Accordingly, I would prefer that the provision be left intact. Authority given to the General Assembly to define "Office of honor or profit" may afford some basis for avoiding the somewhat incongruous results that sometime ensue.

Under the decision of McLure vs. McElroy, 211 S.C. 106, 44 S.E.2d 101, and other cases, all officers whether elected or appointed must be qualified electors. It is probable that such persons as the Director of the State Development Board or a city manager might be considered officers rather than employees. Many of these will not be qualified electors and, therefore, ineligible to hold office if it should be determined that they are officers. This problem has not arisen except with respect to one instance involving membership on a board of trustees. Constitutional provision for such cases may be indicated.

Various portions of the Constitution specifically provide that certain officers may not hold another office of honor, trust or profit under the authority of this State "or of any other power, at one and the same time." See Article IV, Section 3 (Governor). The reference to hold office under any other power is omitted from Article II, Section 2, and the inference is that an individual may hold office under this State, and at the same time serve, for example, as a member of a draft board which has been construed to be a Federal office. A number of decisions have upheld this view and this construction has been applied in this State. Consideration may be given to whether this construction should be clarified in the appropriate provisions.

While I believe that the provision should be retained in its present form, ample latitude is still given for desirable dual office holding by the device of ex officio membership. See Ashmore vs. Greater Greenville, 211 S.C. 77.

ARTICLE II, SECTION 4

It appears reasonable to retain in the Constitution the requirements for suffrage.

A longer period than ten years for registration of electors would appear to be desirable. The trend toward permanent registration seems to be meeting with general favor. Under new registration procedures, there would appear to be less likelihood of obsolescence of registration lists. Accordingly, it appears appropriate to suggest that the General Assembly be vested with authority to establish registration periods and to provide that such periods should not be less than a designated, period of time. Thus, the General Assembly could be empowered to provide for general registration at such periods as it should determine, but not more often than once every ten years.

Obsolete portions of the Section should be removed.

Property qualifications should not be a basis for suffrage as an alternative to literacy requirements.

ARTICLE II, SECTION 6

I recommend that the enumeration of disqualifying crimes be eliminated and that, instead, a general description of disqualifying crimes be made such as "crimes involving moral turpitude" or "infamous crimes." For example, the rules of the Supreme Court provide for disbarment of an attorney upon conviction of a crime "involving moral turpitude." The need for this is illustrated by the omission of the crimes of murder and rape from the present constitutional lists of disqualifying crimes.

Additionally, the provision should be clarified by making disqualifying those crimes committed in foreign jurisdictions, including the United States.

Alternatively, the General Assembly should be empowered to establish such crimes as shall be considered disqualifying.

ARTICLE II, SECTION 8

Comments under Article II, Section 4 are applicable to this provision which deals with registration. These two sections may well be combined and obsolete portions omitted.

ARTICLE II, SECTION 9

The establishment of polling precincts need not be a constitutional mandate, but the requirement that the elector vote in his own precinct should be retained.

ARTICLE II, SECTION 12

Residence provisions for municipal elections are inconsistent with other qualification requirements for registration. Participation in municipal elections should be upon the same basis as in other elections, i.e., there need only be the production of a registration certificate.