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COMMENTARY

Does the S.C. Constitution require legislators to police themselves?

By Shane McNamee

Many, if not most, South Carolina state lawmakers have a peculiar understanding of the separation of powers. For them, the principle seems to mean that all powers should be removed from the executive and judicial branches and concentrated in the legislature.

In the ongoing debate over ethics reform, for instance, several lawmakers are arguing that separation of powers and the state constitution dictate that legislators must be allowed to judge each other when accused of ethics violations. Typically enforcement and interpretation of the law are left to the executive and judicial branches, respectively, but somehow this shouldn't apply to lawmakers accused of ethics violations.

Leaving aside for a moment the legal merits of the argument, the idea that coworkers should police each other's legal violations is ridiculous on its face and wouldn't be accepted in any other context. No one would argue that an employee accused of embezzling from his employer should only be judged by his or her coworkers and no one else. Yet when a lawmaker misuses (embezzles) campaign funds, many lawmakers would contend they should only be held accountable for this violation by their colleagues.

The specific legal writing some lawmakers fall back on to support this practice is Article 3, Section 12 of the State Constitution, which states that "each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but

not a second time for the same cause."

This provision supposedly prohibits the independent adjudication of legislative ethics violations.

That interpretation has been pretty decisively debunked, however. According to Jorge Roig, Associate Professor of Law at the Charleston School of Law:

What Section 12 is referring to is any conduct that a legislator might engage in during legislative proceedings themselves. Section 12 delegates the power to deal with "disorderly behavior" in the context of establishing the privileges and immunities to which legislators are entitled during legislative sessions. The way it's set up in the South Carolina constitution, as well as in other state constitutions and the federal constitution, lawmakers have a particular immunity when it comes to saying things in session. Precisely because they have that immunity, there is a need to control potential "disorderly conduct" during those sessions, and that ability to control disorderly conduct is explicitly granted to the chambers themselves - in Section 12.

Professor Roig goes on to state that in "all of these cases say that when you're dealing with ethical conduct outside these core legislative functions - basically, what happens inside the chamber - the limitation is inapplicable. In those cases, the executive branch can investigate and prosecute, and the judicial branch can impose punishment, as usual. One of the cases, for example, explains that accepting a bribe is not a core legislative function."

His opinion is reinforced by John Simpkins, J.D., formerly Assistant Professor of Law and Director of Diversity Initiatives at the Charleston School of Law:

While the Legislature may craft procedural rules for its daily operations, those rules may not infringe upon fundamental rights. [Roll call voting] is arguably a law that would have an impact on the direct relationship between citizens and their elected representatives, not simply a rule governing how the Legislature is organized or conducts its daily business.

However, even if the proposed legislation is considered to be procedural in nature, the plain language of the South Carolina Constitution demonstrates that the houses of the General Assembly do not have the exclusive authority to determine their procedural arrangements.

(In 2012 Professor Simpkins further reiterated before the governor's Ethics Reform Study Commission, that Article 3, Section 12 has preponderantly to do with the General Assembly's power to stop disorderly conduct - and thus not with members' violations of ethics laws.)

In short, there is nothing

in the state constitution that would either prohibit an independent body from holding lawmakers accountable, or protect lawmakers from the same legal processes faced by their constituents when laws are violated.

The argument that the constitution somehow requires lawmakers to police each other's ethics violations doesn't deserve serious consideration. The reason legislative self-policing exists at all is that it serves the political interests of lawmakers. That's not a sufficient reason to preserve a clearly corrupt arrangement.

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