

THE STATE OF SOUTH CAROLINA
In the Original Jurisdiction
Of the Supreme Court

Governor Marshall C. Sanford, Jr. Petitioner,

v.

South Carolina State Ethics Commission and
Herbert R. Hayden, Jr. in his official capacity
as Executive Director of the State Ethics Commission Respondents.

PETITION FOR WRIT OF MANDAMUS

Respectfully submitted,

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PETITION FOR WRIT OF MANDAMUS

Pursuant to Article V, Section 5 of the South Carolina Constitution and Rule 245(b) of the South Carolina Appellate Court Rules, House Speaker Robert W. Harrell, Jr. (“Speaker Harrell”) petitions this Honorable Court for a Writ of Mandamus, directing the South Carolina State Ethics Commission (“Commission”) and its Executive Director, Herbert R. Hayden, Jr. (“Executive Director”) , to comply with the mandates of the South Carolina Constitution, the South Carolina Code of Laws, and the regulations of the South Carolina State Ethics Commission and release information relative to the investigation of Governor Marshall Clement Sanford, Jr. (“Governor Sanford”) to the South Carolina House of Representatives (“House”), the sole prosecuting authority for purposes of impeachment.

“The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law.” Porter v. Jedziniak, 334 S.C. 16, 512 S.E. 2d 497 (1999). To obtain a writ of mandamus the petitioner “must show (1) a duty of respondent to perform the act, (2) the ministerial nature of the act, (3) the petitioner’s specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy.” Id. at 498.

The South Carolina Constitution, South Carolina Code of Laws, and Regulations issued by the Commission clearly mandate that the Commission release investigative materials and information related to the investigation of Governor Sanford to the South Carolina House of

Representatives. Respondent Commission, through Respondent Director, has made possibly conflicting statements, both written and verbal, as to Commission's intent regarding the release of this information to the South Carolina House of Representatives. This information must be released to the South Carolina House of Representatives to ensure that the House, if it determines impeachment to be warranted, has the ability to properly execute its constitutional responsibility. Therefore, this Court should grant this Petition and issue the requested mandamus.

QUESTION PRESENTED

Must the Commission pursuant to the South Carolina Code of Laws, the Commission's regulations, and the South Carolina House of Representatives' constitutionally granted authority as the sole prosecutorial body for purposes of impeachment, release to the South Carolina House of Representatives information relative to the Commission's investigation of alleged misconduct and alleged unethical actions of Governor Sanford?

RELEVANT FACTS

On or about August 18, 2009, the Executive Director informed Governor Sanford that an investigation had begun concerning allegations of misconduct and possibly unethical behavior by Governor Sanford. On or about August 27, 2009, the Executive Director sent a letter to Governor Sanford's legal counsel which Governor Sanford's legal counsel inferred to state that the investigative materials and information would only be provided to the Attorney General. See, Petitioner Sanford's Exhibit B. On or about August 28, 2009, Governor Sanford provided a waiver of confidentiality concerning the investigation into his alleged misconduct and unethical

acts. See, Petitioner Sanford's Exhibit C. On or about September 8, 2009, the Executive Director expressed, at that time, an intention to comply with the law and release materials and information related to the investigation (the "investigative report") to the House of Representatives, the prosecuting authority for purposes of impeachment. See, Petitioner Sanford's Exhibits D & E. On or about September 14, 2009, Governor Sanford filed a motion with the Commission seeking to enjoin the Commission and its Executive Director from releasing investigative information to the South Carolina House of Representatives. On Wednesday, September 30, 2009, Governor Sanford filed a Petition for Writ of Mandamus asking this Court to (1) prohibit the Commission, and its Executive Director, from complying with the mandates of the South Carolina Constitution, South Carolina Code of Laws, and the Commission's own regulations, and (2) order the Commission, and its Executive Director, to not release investigative information and materials to the South Carolina House of Representatives. The State Ethics Commission is comprised of nine members appointed by the Governor. Four of these nine members of the State Ethics Commission have, prior to being appointed to the Commission by Governor Sanford, made contributions supporting Governor Sanford's efforts to be elected Governor.¹

DISCUSSION

I. The South Carolina House of Representatives is Unequivocally A Prosecuting Authority for Purposes of Impeachment.

Article XV, Section 1 of the South Carolina Constitution states, "The House of Representatives **alone shall have the power of impeachment** in cases of serious crimes or

¹ Upon information and belief Commissioners Edward E. Duryea, E. Kay Biermann Brohl, J.B. Holeman, and G. Carlton Manley are the four Commissioners who, prior to be appointed to the Commission, made campaign contributions to Governor Sanford. See, Exhibit A attached.

serious misconduct in office by officials elected on a statewide basis, state judges, and such other state officers as may be designated by law....” (emphasis added); See also, Blalock v. Johnson, 180 S.C. 40, 185 S.E. 51, 55 (1936) (stating that in the exercise of political and governmental powers the governor is answerable only to the high court of impeachment). Thus, the House is the only entity that may impeach Governor Sanford for serious crimes or serious misconduct.

Impeachment is *sui generis* - a prosecution or proceeding unlike any other. Although “serious crimes and serious misconduct” are possible reasons for impeachment, the relief sought in an impeachment is neither criminal nor civil. The relief sought in impeachment is “political” and is limited solely to the removal of the impeached official from office, if convicted. See, Matthew J. Franck, *THE SUPREME COURT AND THE POLITICS OF IMPEACHMENT* (1996). This limitation on the possible relief is expressly set forth in the Article XV, Section 2 of the South Carolina Constitution stating that “judgment shall be limited to removal from office. Impeachment proceedings, whether or not resulting in conviction, shall not be a bar to criminal prosecution and punishment according to law.”

However, despite the fact that impeachment is a *sui generis* political proceeding unlike any other, it has been historically and repeatedly held in books, treatises, and case law that the body possessing the power of impeachment is the “prosecuting authority” or “prosecutor” for purposes of the impeachment proceeding. See, Charles L. Black, Jr. *IMPEACHMENT: A HANDBOOK* (1974) (stating, “The House, in effect, is the prosecuting authority at the Senate trial); Theodore F.T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* (1956) (referring to impeachment since the 1300’s as an “elaborate prosecution” and confined to “political prosecutions”.); Joseph Story, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED*

STATES, Chapter 9, (referring to impeachment proceedings as “prosecutions of this sort...”, “These prosecutions...”, “such prosecutions...”), Chapter 10 (referring to the House in impeachment proceedings as “[t]he prosecution will”, “by the prosecutors”, “the prosecutors”, “this kind of prosecution”); State v. O’Driscoll, 5 S.C.L. (3 Brev.) 526 (1815) (stating “[w]here object of prosecution is to...remove and disqualify...it must...be carried on by impeachment.); Siegel v. State, 861 So.2d 90, 93 (2003) (referring to impeachment trial as a “prosecution of the charges”); Nixon v. United States, 506 U.S. 224, 242, 113 S.Ct. 732 (1993) (Justice Stevens concurring opinion describing the House role in impeachment as “prosecutorial”); Fitzpatrick v. McAlister, 121 Okla. 83, 248 P. 569, 582 (1926) (describing the House of Representatives presentation of charges to the Senate as a “prosecution thereof”); State v. Buckley, 54 Ala. 599 (1875) (citing Joseph Story’s commentaries referring to impeachment a prosecution); McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873, 877 (1912) (citing Driscoll, *supra*, and implying that impeachment is a prosecution).

The Commission, or other entity, might try to argue that the House is not a prosecutorial authority, despite the overwhelming academic, historical, and legal authority to the contrary. In making this argument the Commission or other entity might cite Article V, Section 24 of the South Carolina Constitution stating the Attorney General is the “chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record.” However, such an argument is without merit.

The South Carolina Constitution must be read as a whole with an effort to give full force and effect to **all** its provisions. Riley v. Charleston Union Station Co., 71 S.C. 457, 51 S.E. 485, 489 (1905) (emphasis added). The Attorney General is the chief prosecutor of all criminal cases in South Carolina. But, as stated earlier, an impeachment is a political prosecution - not a

criminal prosecution. To interpret Article V, Section 24, as preempting the House from being considered a prosecutorial authority ignores the expressed language of Article XV, Section 1 which grants the House sole authority over the impeachment process. Such a conclusion flies directly in the face of the rules of constitutional interpretation stating that “the specific and positive direction of the Constitution, on any particular subject, contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision.” State v. Comptroller General, 4 S.C. 185, 25 S.C. Eq. 31 (4 Rich. Eq.) (1873).

It is also important to note that this Court has already recognized that entities, other than the Attorney General, can be prosecuting authorities for purposes other than criminal trials. A perfect example of this Court’s recognition of prosecuting authorities in proceedings other than criminal proceedings is found in the Office of Disciplinary Counsel. See, In Re Chastain, 340 S.C. 356, 532 S.E.2d 264 (2000) (stating that disciplinary matters are special proceedings, *sui generis*, and do not fall squarely into either civil or criminal categories).

On the Judicial Department website (<http://www.sccourts.org/discCounsel/>) this Court describes the Office of Disciplinary Counsel as being “responsible for **prosecuting** those judges and lawyers who have committed either ethical misconduct, or are suffering from a physical or mental condition ...” (emphasis added) The website goes on to say that the Disciplinary Counsel is “charged by the Supreme Court ... to **prosecute** complaints made against both judges and lawyers” and that the office has “staff attorneys ...**prosecuting** attorney and judicial matters.” (emphasis added) Furthermore, Rule 5 of the Rules of Disciplinary Enforcement states in three separate subsections that Disciplinary Counsel shall “**prosecute**”. RLDE, Rule 5(b)(1), (6), and (7), Rule 413 SCACR (emphasis added).

The fact that this Court has already stated, in its own Rules, that prosecutors, other than the Attorney General, exist in special sui generis proceedings, when considered along with the constitutional provisions granting the Attorney General prosecutorial authority over “criminal” prosecutions and the House sole authority over impeachment, leads to the unequivocal conclusion that the House of Representatives is a prosecutorial authority for purposes of impeachment.

II. The South Carolina Code of Laws and the Commission’s Regulations Allows the Commission to Release Investigation Information and Materials Related to the Investigation of Governor Sanford to the House of Representatives, the Sole Prosecuting Authority for Purposes of Impeachment.

The Commission, or other entity, might argue that Section 8-13-320 of the South Carolina Code of Laws, and its various subsections, prohibit the Commission from releasing information to a prosecutorial authority, such as the House. However, this argument is without merit.

When interpreting a statute “[t]he paramount consideration and the controlling factor in determining the meaning ...is the intent of the Legislature in passing it. In ascertaining the intent...the court is not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of conditions and circumstances as they appeared to the Legislature, and the purpose sought to be accomplished.” Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395, 397 (1936). When read in isolation, some provisions of Section 8-13-320 might mistakenly lead one to conclude that the Commission cannot release its information relative to the investigation of Governor Sanford to the House. However, this Court must look to the entire act and read it as a whole and consider the specific language of Section 8-13-320(n) which states in pertinent part, “[t]his section does not limit the power of either chamber of the General Assembly to impeach a

public official....” S.C. Code Section 8-13-320(n). Clearly, this specific limitation on the confidentiality provisions shows that they do not, and cannot, limit the House’s authority over the impeachment process or the House’s access to the Commission’s investigation information that might relate to a possible impeachment proceeding.

Furthermore, in 1997 the current regulations governing the operations of the Commission were implemented. It is well-settled authority in South Carolina that “[r]egulations authorized by the legislature have the force of law.” See, Goodman v. City of Columbia, 318 S.C. 488, 491, 458 S.E.2d 531 (1995), citing Faile v. SC employment Security Commission, 267 S.C. 536, 230 S.E. 2d 219 (1976); See also, Home Medical Systems, Inc. v. South Carolina Department of Revenue, 382 S.C. 556, 566, 677 S.E. 2d 582 (2009) . In Regulation 52-718 the Commission sets the parameters of its confidentiality requirements. The regulation states, in pertinent part, “[n]o person associated with a complaint ... shall mention the existence of the proceedings or disclose any information pertaining thereto except to persons directly involved....and then only to the extent necessary for investigation and disposition of the complaint. Witnesses and potential witnesses shall be bound by these confidentiality provisions...” It is clearly a very broad confidentiality requirement. However, the regulation goes on to state the following:

“The requirements of confidentiality **do not apply to the following:**

- (1) Providing the identity of the Complainant to the Respondent.
- (2) Disclosing information by the Commission or its staff necessary to conduct and investigation and hearing, to issue subpoenas, and any other action related to the contested case proceedings. [and]

(3) Referring or releasing information to another prosecuting authority.” 24 S.C. Code Ann. Regs. 52-718(c) (Supp. 2008) (emphasis added).

The statute states that the Ethics Act confidentiality provisions do not hinder the House’s authority to impeach or access to information in carrying out the impeachment process, and the Commission’s regulations state that the confidentiality requirements do not apply to a prosecutorial authority. Because the statutes and regulations expressly exempt the House from the confidentiality requirements the Commission may release investigation materials and information, relative to the investigation of Governor Sanford, to the House of Representatives.

Finally, the Commission, or other entity, might also argue that even if the House is a prosecuting authority for purposes of impeachment, the House does not take on a prosecutorial role until a resolution of impeachment is filed in the House. Consequently, the Commission, or other entity, might further argue that the Commission cannot release information to the House until such a resolution is filed. Again, such an argument is without merit.

As explained in depth earlier, the House is unequivocally the sole prosecuting authority for purposes of impeachment, and the Attorney General is the chief prosecuting authority for criminal proceedings in the state. If this Court were to accept an argument that the House is not a prosecuting authority until the filing of an impeachment resolution, the Court would have to reach a similar conclusion that the Attorney General is not the chief prosecutor until criminal charges are filed. Such an absurd conclusion would require the Attorney General, in a criminal case, and the House, in the case of impeachment, to file charges alleging a crime or misconduct BEFORE being able to review investigative information relevant to the situation. Such an argument is meritless and beyond the realm of comprehension.

III. The South Carolina Constitution and the Separation of Powers Mandates that the Commission Release its Investigation Materials to the House of Representatives.

Not only does the South Carolina Code of laws and the Commission's regulations expressly allow the Commission to release its investigation materials and information to the House of Representatives, the South Carolina Constitution and the separation of powers mandates that the Commission, if instructed by the House, release its investigation materials, concerning the investigation of Governor Sanford, to the House of Representatives.

The impeachment authority provided to the House pursuant to Article XV, Section 1 is plenary in nature and limited only by the provisions of the United States Constitution and the South Carolina Constitution. It is well settled that the "General Assembly represents the sovereign power of the State in legislative matters, and its powers are unlimited, except where expressly prohibited by the Constitution." Taylor v. Marsh, 211 S.C. 36, 43 S.E. 2d 606 (1947). Furthermore, the General Assembly "is not a body of delegated power, as is the Congress, but its legislative power is supreme, unless limited by the Constitution itself." Trustees of Wofford College v. City of Spartanburg, 201 S.C. 315, 23 S.E. 2d 9 (1942).

Article XV, Section 1 of the South Carolina Constitution vests the sole power of impeachment in the South Carolina House of Representatives. Specifically, Article XV, Section 1 states:

"The House of Representatives alone shall have the power of impeachment in cases of serious crimes or serious misconduct in office by officials elected on a statewide basis, state judges, and such other state officers as may be designated by law." S.C. Const. art. XV, Section 1

This provision provides the House with broad and sole authority over the process of impeachment of state officials, state judges and state officers in South Carolina, including the

governor, and, as stated previously, is subject only to limitations specifically set forth in the Constitution.

Thus, no provision of the South Carolina Code or the South Carolina Code of Regulations can be construed to constrain the authority of the House of Representatives for purposes of impeachment. When “adjudicating litigated rights under a statute, it appears beyond all reasonable doubt that when the statute is in conflict with some express or implied provision of the Constitution, it is then within the power and the duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative ab initio, so that the Constitution and not the statute will be applied by the court in determining the litigated rights.” Trustees of Wofford College v. Burnett, 209 S.C. 92, 39 S.E.2d 155 (1946).

As has been previously discussed herein, the South Carolina Code and the South Carolina Code of Regulations provide certain confidentiality requirements with respect to the Ethics Commission releasing information related to an investigation. While those provisions serve a noble purpose in protecting the accused from any potential misuse of information for political purposes or otherwise, that purpose is not intended and cannot be allowed to inhibit the authority, duty and obligation of the House in fulfilling its constitutional duties pursuant to Article XV, Section 1.

As previously noted, the only limitations on the House’s authority under the provisions of Article XV, Section 1 are those contained within the constitution itself. In order to perform its due diligence in the performance of its duties under Article XV, § 1, the House is entitled to access all relevant information that it so desires, and that access can only be limited by the

South Carolina Constitution and the United States Constitution. The House's authority over impeachment cannot be restrained by any statutorily created restrictions.

Furthermore, any interpretation that permits the provisions of the South Carolina Code and the South Carolina Code of Regulations to restrict the House's access to information for the purposes of Article XV, Section 1 violates the doctrine of Separation of Powers. Article I, Section 8 of the South Carolina Constitution provides:

“In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”

This Court has stated that a prime reason for the separation of powers “is the desirability of spreading out the authority for the operation of the government to prevent the concentration of power in the hands of too few and provide a system of checks and balances.” Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009), citing State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). The process of impeaching a governor is at the core of the system of checks and balances in South Carolina state government. The impeachment process is solely vested to the General Assembly for the purpose of preventing interference and frustration with the process by any other branch of government, and, particularly in the case of the impeachment of the governor, preventing interference or frustration by the executive branch of government.

The South Carolina State Ethics Commission is appointed by Governor Sanford upon the advice and consent of the General Assembly. S.C. Code Ann. Section 8-13-310(B). The confidentiality provisions set forth in Section 8-13-320 of the South Carolina Code as well as Section 52-718 of the Ethics Commission Regulations restrict the ability of all individuals involved to release information relating to the investigation. These restrictions extend to the

complainant, the respondent, counsel, counsel's staff, Commission members or employees, reporters and investigators as well as to witnesses and potential witnesses. S.C. Code Ann. Regs. 52-718 (a) (Supp. 2008) But, these provisions are interpreted to restrict the General Assembly's access to information during the course of an ethics investigation it will significantly impair the ability of the General Assembly to perform its constitutional duties relating to impeachment under Article XV, Section 1. Indeed, such an interpretation may limit the General Assembly's ability to subpoena information or testimony from witnesses if such information or witnesses were already part of a State Ethics Commission investigation. Further, such an interpretation could also create the perverse incentive for a statewide elected official, such as Governor Sanford, who may be facing impeachment, to seek the instigation of an Ethics Commission investigation in order to frustrate, delay, and possibly prevent the House from effectively carrying out its constitutional duties pursuant to impeachment. Such an interpretation would clearly thwart the constitutionally mandated separation of powers and cannot be allowed by this Court.

CONCLUSION

Pursuant to the South Carolina Constitution, the South Carolina Code of Laws, and its own regulations, the State Ethics Commission must release its investigation materials and information concerning the investigation of Governor Mark Sanford, to the South Carolina House of Representatives, the sole prosecuting authority for purposes of impeachment. Therefore, Petitioner Intervenor Harrell's Petition for Writ of Mandamus asking the Court to direct the Commission to issue its investigation materials and information to the House of Representatives, if requested, should be granted accordingly.

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