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Government of the District of Columbia

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February 8, 1989

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Authority of the Council of the District of Columbia to limit the number of terms an individual can serve in the office of Mayor.

Dwight S. Cropp
Director
Office of Intergovernmental Relations
District Building
Washington, D.C. 20004

Dear Mr. Cropp:

As you know, Bill 8-6, the "Election Amendment Act of 1989," currently pending before the Council of the District of Columbia, would amend the District's elections law to prohibit an individual from serving more than two consecutive terms as Mayor. The office of Mayor is established in the District Charter, set out in Title IV of the District of Columbia Self-Government and Governmental Reorganization Act (Self-Government Act), 87 Stat. 774, Pub. L. 93-198 (codified in scattered sections of the D.C. Code). A limitation on the number of terms one can serve in the office of Mayor is in effect an additional qualification for that office. In my opinion, any change in the qualifications for holding the office of Mayor requires an amendment to the District Charter and cannot be accomplished by ordinary legislative act of the Council.

I have expressed my views to the Council's Committee on Government Operations on two occasions.[1] However, because Bill

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[1] See Statements of Frederick D. Cooke, Jr. on Bill 7-338 and Bill 8-6 at public roundtables before the Committee on Government Operations held January 28, 1988 and February 2, 1989.

8-6 raises significant Charter concerns, I am transmitting this formal opinion in order to lay out the legal support and analysis which formed the basis for the position previously taken.[2]

It is a well established principle of law that where a constitution creates an office and sets forth the qualifications for that office, a legislature has no power to vary those qualifications, absent an explicit or implied grant of authority.[3] As explained in Thomas v. State ex rel Cobb, 58 So. 2d 173 (Fla. 1952), (cited at 34 A.L.R.2d 140, 152 (1954):

> . . . [I]f the Legislature possesses the power to vary the constitutional qualifications for office by adding new requirements or imposing additional limitations, then eligibility to office and freedom of elections depend, not upon constitutional guaranties, but upon legislative forbearance. If the Legislature may alter the constitutional requirements, its power is unlimited, and only such persons may be elected to office as the Legislature may permit. In our judgment, when the

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[2] Opinions of the Corporation Counsel have been accorded substantial deference by the courts. See Techworld Development Corp. v. D.C. Preservation League, 648 F. Supp. 106 (D.D.C. 1986) (". . . opinions rendered by the Corporation Counsel concerning the application of the [Height of Buildings Act of 1910] are entitled to substantial deference, and should only be overturned by this court if they are plainly unreasonable or contrary to legislative intent.") Administratively, the written opinion of the Corporation Counsel "in the absence of specific action by the [Mayor] or Council to the contrary, or until overruled by controlling court decision, shall be the guiding statement of law, to be followed by all District officers and employees in the performance of their official duties." See Reorg. Order No. 50 (June 26, 1953), D.C. Code Title 1 App. (1973).

[3] A corollary principle of law is that a state constitution is a limitation on the exercise of power not a grant of power. Therefore, the state legislature may enact any law not expressly or impliedly forbidden by the state constitution or prohibited by the United States constitution. See 11 Am. Jur. 2d Constitutional Law § 194. However, a state constitution cannot be changed, modified, or amended by legislative fiat. It provides within itself the only method of amendment, which operates as an express limitation on the power of the state legislature.

> Constitution undertakes to prescribe qualifications for office, its declaration is conclusive of the whole matter, whether in affirmative or in negative form. . . . The expression of the disabilities specified excludes others. The declaration in the Constitution that certain persons are not eligible to office implies that all other persons are eligible.

The overwhelming majority of state courts that have considered the question have held that where a constitution fixes specific eligibility requirements for an office, those requirements are regarded as exclusive. See cases collected at Annotation, Legislative Power to Prescribe Qualifications for or Conditions of Eligibility to Constitutional Office, 34 A.L.R.2d 155 (1954). Of those 32 states that have ruled on the issue, 28 states have adhered to this rule. In 3 states an opposite conclusion was reached on the facts but it was unclear to what extent the cases represented a disagreement with the general rule. A single decision repudiated the rule in dictum.

District of Columbia courts have never addressed this question. However, Maryland courts have considered the issue, and Maryland decisions are often looked to for assistance by courts in the District of Columbia, since Maryland law predating the organization of the District of Columbia continues to have force in the District. See, e.g., Watkins v. Rives, 75 U.S. App. D.C. 109, 125 F.2d 33 (1941); Gerace v. Liberty Mutual Insurance Co., 264 F. Supp. 95 (D.D.C. 1966) (Maryland decisions entitled to great weight).

The general principle -- that where a constitution sets forth qualifications for an office, the legislature may not add to those qualifications -- was first recognized in Maryland in dicta in Thomas v. Owens, 4 Md. 189 (1853) (cited at 34 A.L.R.2d 200 (1954)), construing a constitutional provision permitting the legislature to prescribe the oath and bond required for holding a particular constitutional office. In that case the constitution had specifically authorized the legislature to prescribe the oath and bond requirements. The court explained that without such a provision, the legislature would have been prohibited from imposing that additional qualification, and noted the foresight of the framers of the constitution in permitting the legislature to deal with the issue as necessary through enactment of a statute, rather than being restricted to seeking a constitutional amendment to add those requirements.

Later Maryland cases have uniformly held that the legislature may not prescribe additional qualifications where the qualifications for office are set forth in the constitution. These cases dealt with imposition of a residency requirement and

imposition of an additional oath of office. See Davidson v. Brice, 91 Md. 681 (1900) (constitution set forth oath of office and expressly prohibited legislature from prescribing additional oath as qualification for office; additional oath prescribed by legislature for statutory office unconstitutional); Humphreys v. Walls, 169 Md. 292, 181 A. 735 (1935); Quenstedt v. Wilson, 173 Md. 11, 194 A. 354 (1937); and Kimble v. Bender, 173 Md. 608, 196 A. 409 (1938) (all holding unconstitutional statutory residency requirements for justice of the peace where residency was not among the qualifications specified in the constitution).

The specific issue of limiting the successive number of terms an officer may hold has been construed by several courts. In Buckingham v. State ex rel. Killoran, 35 A.2d 903 (Del. 1944), the Delaware Supreme Court invalidated a statute disqualifying a state judge from being a candidate for elective office during his term of office and for six months after leaving office, observing that where a constitution creates an office and prescribes the qualifications that the incumbent must possess the legislature has no power to add to these qualifications, and found that the statute just as effectively added to the qualifications of office, and as such was beyond the authority of the legislature.

Even where a statute prohibiting certain school board members from succeeding themselves or being eligible for another term for a period of two years following the expiration of their terms was upheld, the Supreme Court of Georgia relied on the general principle that a legislature may not add to the qualifications of office where the constitution sets forth the qualifications. In Estes v. Jones, 48 S.E.2d 99 (Ga. 1948), the Court ruled that the legislature's imposition of this additional qualification was valid specifically because the constitution set forth no qualifications for the office, thus leaving that authority to the legislature.

The District Charter, enacted as part of the Self-Government Act, is analogous to a state constitution. Section 421 of the Charter, D.C. Code § 1-241 (1987), establishes the office of Mayor of the District of Columbia. Section 421(b) establishes three qualifications for holding the office of Mayor: An individual must be a qualified elector, a resident and domiciliary of the District for one year prior to election, and, with certain exceptions, may not be otherwise employed for compensation or hold other public office. Bill 8-6 would essentially add a fourth qualification: that an individual has not served two successive terms immediately preceding the election. The District Charter does not empower the Council of the District of Columbia to vary these requirements, either by adding additional requirements or dispensing with existing requirements, without going through the Charter amendment

procedure outlined in the Self-Government Act.[4]

The authority of the Council under section 752 of the Self-Government Act, D.C. Code § 1-1307 (1987), to legislate "with respect to matters involving or relating to elections in the District" extends to the process of conducting elections. The fact that Bill 8-6 is drafted as an amendment to the District's elections law rather than an amendment to the Charter does not change its basic character, which is a modification to the qualifications for holding office. The amendment in no way addresses the conduct of the election but defines who may hold office without reference to the procedures for attaining that office.

A Maryland case illustrates the difference. In Shub v. Simpson, 76 A.2d 332 (Md. 1950), the Court of Appeals of Maryland upheld a statute requiring a candidate for office to file an affidavit stating that he is not subversive, notwithstanding a lack of legislative authority to require an oath of office in addition to that prescribed by the Maryland constitution. The Court held that the affidavit was not an oath of office. The constitution itself disqualified subversive individuals from holding office. The candidate's affidavit was merely a tool for identifying persons disqualified from holding office, and was thus within the legislature's authority to protect the integrity of the election process. The provision before the Council, to the contrary, goes not to the process (i.e., how a qualified individual may attain office), but to the individual's eligibility to hold that office under any process. This is beyond the Council's authority, notwithstanding its clear authority to legislate with respect to elections.

Finally, I note that the terms of the President of the United States were limited by amendment to the Constitution, not by legislative act of the Congress of the United States. In the legislative history of the joint resolution of Congress proposing the amendment (H.J. Res. 27), both the House and Senate Committees on the Judiciary expressed the view that an issue as important as this entitles the people to have a voice in its resolution. See H. REP. No. 17 (Feb. 5, 1947), and SEN. REP. No. 34 (Feb. 21, 1947), 80th Cong., 1st Sess., reprinted in U.S. CODE CONG. & ADMIN. NEWS 1013, 1014.

In addition, each of the 28 states and 4 out of 5 United States Territories that have imposed upon its governor a

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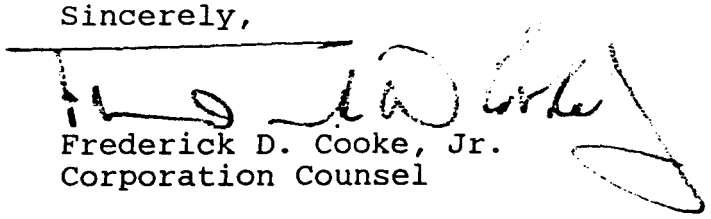
[4] The Charter "may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." See section 303 of the Self-Government Act, D.C. Code § 1-205(a) (1987).

limitation on serving successive terms have done so by constitutional amendment.

Since Bill 8-6 does not provide for ratification by a majority of the registered qualified electors of the District, as required under the Charter amending procedures, it exceeds the scope of the legislative authority granted the Council under the Self-Government Act.

Sincerely,



Frederick D. Cooke, Jr.
Corporation Counsel