



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

January 22, 2021

The Honorable Lee J. Carter
Member, Virginia House of Delegates
Post Office Box 243
Manassas, Virginia 20108

Dear Delegate Carter:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Background and Issue Presented

On January 6, 2021, a rally was held near the White House, where President Donald J. Trump and others encouraged attendees to “fight” to “take back” the country, including “walk[ing] down Pennsylvania Avenue.”¹ Soon thereafter, a violent mob stormed the Capitol in an effort to block Congress from carrying out its constitutional duty to certify the results of the November 2020 presidential election.² After overwhelming Capitol security, rioters rampaged through the building, searching for elected officials and vandalizing the seat of our democratically elected national government.³ Lawmakers had to be evacuated from the legislative chambers and sequestered at secure locations for much of the day until order was restored.⁴ Five people were killed (including one Capitol Police officer) and many more were injured.⁵

¹ Transcript, Jan. 6, 2021, available at <https://www.usnews.com/news/politics/articles/2021-01-13/transcript-of-trumps-speech-at-rally-before-us-capitol-riot>; see also Kimberly Dozier & Vera Bergengruen, *Incited by the President, Pro-Trump Rioters Violently Storm the Capitol*, TIME (Jan. 7, 2021), <https://time.com/5926883/trump-supporters-storm-capitol/>.

² Dozier & Bergengruen, *supra* note 1; see also U.S. CONST. amend. XII (providing that the Vice President “shall, in the presence of the Senate and House of Representatives, open all the certificates [from the Electoral College] and the votes shall then be counted”).

³ Jay Reeves, Lisa Mascaro & Calvin Woodward, *Capitol assault a more sinister attack than first appeared*, ASSOCIATED PRESS (Jan. 11, 2021), <https://apnews.com/article/14c73ee280c256ab4ec193ac0f49ad54>.

⁴ Jada Yuan, *On their third day at work, congressional freshmen went through disorientation*, WASH. POST (Jan. 12, 2021), https://www.washingtonpost.com/lifestyle/style/freshmen-congress-capitol-riot-attack/2021/01/12/8ded007a-537e-11eb-a931-5b162d0d033d_story.html; Ashley Parker, Carol D. Leonnig, Paul Kane & Emma Brown, *How the rioters who stormed the Capitol came dangerously close to Pence*, WASH. POST (Jan. 15, 2021),

According to your letter, “[a]t least one member of the General Assembly is alleged to have participated in the events” of that day.⁶ You request a formal opinion regarding the General Assembly’s ability to enact discipline against its members in response to these events, and in particular the implications of the Fourteenth Amendment.

Applicable Law and Discussion

1. The Fourteenth Amendment provides that those who engage in insurrection or rebellion may be expelled from public office, or disqualified from holding future public office.

Section 3 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

No Person shall . . . hold any office, civil or military, . . . under any State, who, having previously taken an oath . . . as a member of any State legislature . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.^[7]

Section 3 of the Fourteenth Amendment was enacted to ensure that former leaders of the Confederacy could not use public office to interfere with efforts to restore constitutional order after the Civil War.⁸ Historically, Section 3 was used to prohibit former Confederates from participating in state constitutional conventions and barring rebel office holders from resuming their posts after the war.⁹ Although Section 3

https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html.

⁵ Eric Levenson, Amir Vera & Mallika Kallingal, *What we know about the 5 deaths in the pro-Trump mob that stormed the Capitol*, CNN (Jan. 8, 2021), <https://www.cnn.com/2021/01/07/us/capitol-mob-deaths/index.html>; see also Peter Hermann & Julie Zauzmer, *Beaten, sprayed with mace and hit with stun guns: police describe injuries to dozens of officers during assault on U.S. Capitol*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/local/public-safety/police-capitol-injures-trump/2021/01/11/ca68e3e2-5438-11eb-a08b-f1381ef3d207_story.html.

⁶ Jim McConnell, *Sen. Chase attends D.C. rally, refuses to denounce attack on U.S. Capitol*, CHESTERFIELD OBSERVER (Jan. 7, 2021), <https://www.chesterfieldobserver.com/articles/sen-chase-attends-d-c-rally-refuses-to-denounce-attack-on-u-s-capitol/>; Bill Atkinson, *Chase calls Wednesday’s Capitol riots the start of ‘a revolution’ by people backed ‘into a corner,’* THE PROGRESS-INDEX (Jan. 6, 2021), <https://www.progress-index.com/story/news/2021/01/06/va-gubernatorial-hopeful-says-capitol-riots-sign-revolution/6575010002/>; Andrew Beaujon, *After Joining Capitol Protest, Virginia State Representative Says Critics Should Focus on “Colored Community” Instead*, WASHINGTONIAN (Jan. 13, 2021), <https://www.washingtonian.com/2021/01/13/virginia-state-representative-says-critics-should-focus-on-colored-community-instead/>; Matthew Barakat, *Virginia delegate defends mob march, faces calls for ouster*, WASH. POST (Jan. 13, 2021) https://www.washingtonpost.com/local/virginia-delegate-defends-mob-march-faces-calls-for-ouster/2021/01/13/fa2f9f9c-55c5-11eb-acc5-92d2819a1ccb_story.html.

⁷ U.S. CONST. amend. XIV, § 3.

⁸ Even before the Fourteenth Amendment was technically ratified, the same rules were used to safeguard post-Civil War state constitutional conventions from Confederate influence. *See* First Military Reconstruction Act, Ch. 153, 14 Stat. 428–30, § 5 (providing that “no person excluded from the privilege of holding office by [Section 3], shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such convention.”).

⁹ *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment* (Dec. 14, 2020) (forthcoming) (manuscript at 15–20, 33–37), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3748639; *see also* Worthy v. Barrett, 63 N.C. 199 (1869) (holding that a county sheriff was an “officer”

was enacted in response to the Civil War, its coverage is not limited to any particular “insurrection” or “rebellion.” The policy behind the provision is clear: Engaging in insurrection against our representative government is fundamentally incompatible with holding public office, and disqualification from such office is one way that officials who engage in insurrection or rebellion can be held accountable.¹⁰

Although there is some authority to suggest otherwise, the weight of authority appears to be that Section 3 of the Fourteenth Amendment is not “self-executing”—put another way, it is possible that Congress may need to pass implementing legislation to make this provision operative.¹¹ But regardless of that unresolved question or whether Congress enacts such implementing legislation in the future, as explained further below, the General Assembly and other legislative bodies possess broad tools and authority for disciplining or removing members who, in the opinion of the legislative body, warrant discipline or expulsion.

2. The General Assembly possesses authority to determine whether its members’ conduct warrants discipline or expulsion.

Each body of the Virginia General Assembly possesses broad power to discipline and, where it judges appropriate, expel member legislators. Article IV, Section 7 of the Constitution of Virginia provides that “[e]ach house” of the General Assembly “may punish [its members] for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member.”¹² Whether to “punish” or “expel” a member is committed solely to the discretion of the relevant legislative body.¹³

under Section 3 because he was previously “require[d] . . . to take an oath to support the Constitution of the State, and of the United States” and was disqualified from holding office again); In *Re Tate*, 63 N.C. 308 (1869) (holding that a newly elected state solicitor was disqualified from holding office by Section 3 because he had been a county attorney before the war and served in the Confederate Army). In Virginia specifically, Elk Creek’s postmaster general was removed from office pursuant to Section 3 and implementing legislation that had been adopted by Congress. See *A Case Under the Fourteenth Amendment*, RICHMOND DAILY DISPATCH, No. 133 (June 7, 1871), available at https://chroniclingamerica.loc.gov/data/batches/vi_kors_ver02/data/sn84024738/00271742009/1871060701/0545.pdf; see also The Enforcement Act of 1870, Ch. 114, 16 Stat. 140 (1870).

¹⁰ Since the Founding, Congress has expelled members for a variety of reasons, including supporting attacks on the United States and our constitutional order. To date, 20 members of Congress have been expelled, many of them because of their support of the Confederacy. Cynthia Brown & Todd Garvey, *Expulsion of Members of Congress: Legal Authority and Historical Practice* at 10, CONG. RES. SERV. (Jan. 11, 2018); see also SENATE HISTORICAL OFFICE, *The Civil War Senate Reacts to Secession*, https://www.cop.senate.gov/artandhistory/history/common/expulsion_cases/CivilWar_Expulsion.htm (last accessed January 21, 2021).

And, in Virginia, too, at least one legislator has been expelled for opposing representative government. Letter from Edmund Randolph to James Madison n.13 (Dec. 27, 1782), Nat’l Historical Publications and Records Comm’n, available at <http://founders.archives.gov/documents/Madison/01-05-02-0193>; JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 78–79 (1782) (McCraw “expelled from his seat” on December 23, 1782).

¹¹ In *re Griffin*, 11 F. Cas. 7, 24–26 (Chase, Circuit Justice, C.C.D. Va. 1869) (No. 5,815).

¹² VA. CONST. art. IV, § 7; see also *Pine v. Commonwealth*, 121 Va. 812, 825, 93 S.E. 652, 655 (1917) (noting that expulsion from legislature requires two-thirds vote).

¹³ See 1980-81 Op. Va. Att’y Gen. 186, 187 (“The authority of the legislative branch to judge the qualifications of and discipline its members has . . . been viewed as the exclusive province of the legislature under the separation of powers doctrine.”); 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 506 (1974); (noting potential for “unwholesome friction between coordinate branches of government” with respect to Article IV,

This provision is not unique to Virginia. Rather, it is nearly identical to the parallel provision in the United States Constitution¹⁴ and it is similar to provisions in most other State constitutions that also empower each chamber to expel a member with a two-thirds vote.¹⁵ Provisions like Article IV, Section 7 recognize and confirm legislative bodies' authority over internal matters of member discipline and expulsion.¹⁶ In crafting the federal provision, the Framers adopted the "traditional assumption" from "Parliament and the colonial legislatures that a legislature's inherent power to expel its own is wholly discretionary."¹⁷ Under this view, "the determination of what conduct justifies imposition of this severe sanction is to be made by the legislature itself."¹⁸ This broad interpretation of legislative authority is consistent with the text of the provisions, which do not identify or specify the type of conduct that would warrant discipline or expulsion. Consequently, the United States Supreme Court has long recognized the authority of the legislature to "preserv[e] its institutional integrity," which "can be sufficiently safeguarded by the exercise of its power" to punish or expel members.¹⁹

Therefore, it is my opinion that it is within the discretion of each legislative chamber to ascertain and weigh the extent to which an individual participated in the attack on the U.S. Capitol on January 6, 2021, and whether it warrants discipline or renders a member unfit to continue holding office in the General Assembly.²⁰

Conclusion

Section 3 of the Fourteenth Amendment disqualifies from public office individuals who "shall have engaged in insurrection or rebellion against" the Constitution of the United States, though it remains an unresolved question as to whether Congress must pass additional enabling legislation to make it operative. Regardless of the answer to that unresolved question, the Constitution of Virginia unequivocally grants plenary authority to each chamber of the General Assembly to discipline or expel its members. Further, the terms of Section 3 of the Fourteenth Amendment and related historical precedent confirm that expulsion may be an appropriate sanction if a member "shall have engaged in insurrection or rebellion against" the United States Constitution or has "given aid or comfort to the enemies thereof."

Section 7); *see also* VA. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct . . .").

¹⁴ U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

¹⁵ *See* HOWARD, *supra* note 13, at 506.

¹⁶ *Id.*

¹⁷ Dorian Bowman & Judith Farris Bowman, *Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint*, 29 SYRACUSE L. REV. 1071, 1090, n.95 (1978) ("There seems to be general agreement in the published literature that the expulsion clause itself does not provide any limitation on the power of Congress to expel.").

¹⁸ *Id.*; *see also* Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* at 10, CONG. RES. SERV. (June 27, 2016) (describing power of the House to punish members for disorderly behavior as "full and plenary" and "discretionary in character . . . restricted by no limitation except in case of expulsion the requirement of the concurrence of a two-thirds vote").

¹⁹ *Powell v. McCormack*, 395 U.S. 486, 548 (1969); *see also* *In re Chapman*, 166 U.S. 661, 668 (1897) (noting, in connection with authority to discipline and expel members, that Congress "necessarily possesses the inherent power of self-protection"); *Whitener v. McWatters*, 112 F.3d 740, 744 (4th Cir. 1997) (noting that the expulsion power "is the primary power by which legislative bodies preserve their 'institutional integrity'").

²⁰ The process for ascertaining and weighing the conduct of a legislator is to be determined by the body.

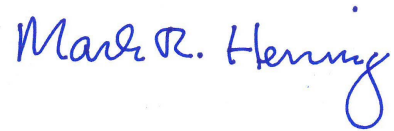
The Honorable Lee J. Carter

January 22, 2021

Page 5

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a distinct "R".

Attorney General