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ATTORNEY GENERAL

October 20, 2015

The Honorable Kenneth A. Bingham, Chairman
House Legislative Ethics Committee
P.O. Box 11867
Columbia, SC 29211

Dear Chairman Bingham:

You seek an opinion on behalf of the House Ethics Committee regarding an interpretation of the Ethics Act. Specifically, your issue is "the jurisdiction of the committee to bring a complaint against either a former candidate or former member for a violation which occurred within the four year statute of limitations." By way of background, you state:

> Specifically, S.C. Code Ann. § 8-13-530(1) and (4) states that the Committee may:
>
> (1) ascertain whether **a person** has failed to comply fully and accurately with the disclosure requirements of this chapter and promptly notify the **person** to file the necessary notices and reports to satisfy the requirements of this chapter;
>
> (4) receive and hear a complaint which alleges a breach of a privilege governing **a member or staff** of the appropriate house, the alleged breach of a rule governing a **member or staff of or candidate** for the appropriate house, misconduct of a **member or staff of or candidate** for the appropriate house, or a violation of this chapter or chapter 17 of Title 2. Action on a complaint filed against a member or candidate which was received more than fifty days before the election but which cannot be disposed of or dismissed by the ethics committee at least thirty days before the election must be postponed until after the election; . . . .
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> S.C. Code Ann. § 8-13-530(4) (emphasis in original). Further, House Rule 4.16.B. explains the jurisdiction of the Committee as:
>
> (1) The committee shall have jurisdiction over **individuals and entities** pursuant to Chapter 13, Title 8[;] (2) No matter shall be considered later than four years after the violation allegedly occurred [;] (3) No complaint may be accepted by the Ethics

> Committee concerning a member of or a candidate for the House during the fifty day period before an election in which the member or candidate is participating.

House Rule 4.16.B. (emphasis added). Included within the jurisdiction is the authority of the committee to investigate a complaint, conduct a hearing, and render findings of fact regarding the complaint. S.C. Code Ann. § 8-13-530(4) provides that "**an individual** has ten days from the date of the notification of the ethics committees' action to appeal the action to the full legislative body." (emphasis added).

As background, the definitions for "person,", "individual ," "candidate," and "member" must be considered as well as a review of any applicable committee advisory opinions. A person is defined as "an individual, a proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert." S.C. Code Ann. § 8-13-100(24). An individual is "one human being." S.C. Code Ann. § 8-13-100(20). A candidate means "a person who seeks appointment, nomination for election, or election to a state or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election. It also means a person on whose behalf write-in votes are solicited if the person has knowledge of such solicitation." S.C. Code Ann. § 8-13-100(5); see also § 8-13-1300(4). A member is considered a public official which means, "an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. . . ." Section 8-13-100(27). (emphasis in original).

Law/Analysis

The issue you have raised is novel and there is a paucity of legal authority governing this question. The issue is essentially this: the power or jurisdiction, statutory or inherent, of a legislative body to punish a former member who has resigned for conduct as a legislator.

A general overview of case law in this area is first helpful. We have found decisions in South Carolina which are somewhat analogous to the one you raise. For example, In The Matter of Ferguson, 313 S.C. 120, 437 S.E.2d 72 (1993) is instructive. There, the question before the Supreme Court was "whether Ferguson's resignation from judicial office, prior to the initiation of judicial misconduct action, prevents us [the Supreme Court] from acting under the jurisdictional requirements outlined in Rule 502 of the South Carolina Appellate Court Rules (Judicial Discipline and Standards). . . ." The Court referenced In the Matter of Maxwell, 287 S.C. 594, 340 S.E.2d 541 (1986) as dispositive, concluding as follows:

> [t]he mere fact that Ferguson is no longer a judge at the time the proceedings are initiated is irrelevant. Historically we have sanctioned judicial officers for acts committed prior to the assumption of office. See Matter of Peeples, 297 S.C. 36, 374 S.E.2d 674 (1988). Maxwell is also in accord with the line of cases which have conferred jurisdiction over suspended judges. See Matter of Derrick, 301 S.C. 367, 392 S.E.2d 180 (1990) (where a judge was sanctioned after being relieved for a criminal conviction).

313 S.C. at 123, 437 S.E.2d at 74. The Court further explained that "[t]he mere fact that Ferguson is no longer a judge at the time the proceedings are initiated is irrelevant." Maxwell had referenced conduct "while serving as a Magistrate." 287 S.C. at 595, 340 S.E.2d at 542.

Moreover, In The Matter of Cromartie, 401 S.C. 265, 736 S.E.2d 856 (2013) is also helpful. There, a member of the Bar committed misconduct and irrevocably resigned as a member during oral argument. The Court accepted his irrevocable resignation, but then assessed upon him the costs of the disciplinary proceedings, as well as surrender of his law license. Thus, the Court imposed upon a member of the Bar additional punishment following resignation.

Also relevant to this question is the decision, Joint Legislative Committee for Judicial Screening v. Huff, 320 S.C. 241, 464 S.E.2d 324 (1995). In that case, one question was an interpretation of § 2-1-100, which prohibits a Senator or Representative "during the time for which he was elected" from being elected or appointed to "any civil office under the dominion of the State" if the office was "created during the time the Senator or Representative was elected to serve in the General Assembly." Huff addressed whether § 2-1-100 is applicable to members seeking judgeships created during their terms if the member resigned prior to seeking the judicial position. Answering the question in the affirmative, the Court said that § 2-1-100 "clearly applies whether or not a member resigns because he is elected 'during the time which he was elected" to an office which was created during the time for which [he] was elected to serve.'" 320 S.C. at 245, 464 S.E.2d at 326. In other words, for purposes of the statute, the resignation had no impact upon the legislator being treated as a "member" until the end of term for which he was elected.

In addition, there are decisions which conclude that former legislators are entitled to absolute legislative immunity for acts performed while legislators. For example, in Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994), the en banc Third Circuit Court of Appeals held that:

> . . . both the present and former member of the County Council are immune from suit because the actions they took with respect to Acierno's commercial property were either substantively and procedurally legislative in nature. . . .

40 F.3d at 600 (emphasis added). The Cloutier Court cited Nixon v. Fitzgerald, 457 U.S. 731 (1982) as controlling. In Nixon, the Supreme Court held that former President Nixon, who had

resigned from office, was absolutely immune for acts committed in his official capacity while in office. There, the Supreme Court stated:

> [a]pplying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of separation of powers and supported by our history.

457 U.S. at 749. The Nixon Court cited with approval Tenney v. Brandhove, 341 U.S. 367 (1951), where the Court had addressed whether the passage of 42 U.S.C. § 1983, "which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. Tenney held that it had not." Id. at 745.

And, in Smith v. Beasley, 2007 WL 215663 (D.S.C. 2007) (unpublished decision), then District Judge Henry Floyd concluded that former legislators were entitled to absolute legislative immunity for acts performed as legislators while in office. There, he summarized the law as follows:

> [m]oreover, even if a legislator or former legislator had been named as a party Defendant, the individual members of the General Assembly who passed Act. No. 83 in 1995 are also immune from suit with respect to their enactment of Act No. 83. See Bogan [v. Scott-Harris, 523 U.S. 44 (1998)] 523 U.S. at 140 (legislators at all levels of government are entitled to immunity for "legislative activities"); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).....

Id. at n. 3.

More specifically, with respect to the constitutional power of the South Carolina General Assembly to punish its own members, our Supreme Court recently stated:

> . . . the South Carolina Constitution and this Court have expressly recognized and respected the Legislature's authority over the conduct of its own members. See e.g. Const. Art. 3 § 11 (stating each house has the authority to judge the election returns and qualifications of its own members); Art. 3 § 12 (providing that each chamber shall determine its own rules of procedure, punish its members for disorderly behavior, and expel a member); see also Stone v. Leatherman, 343 S.C. 484, 541 S.E.2d 241 (2001) (finding court did not have jurisdiction over election result in light of Article 3, § 11 of the Constitution that provides the Senate has the authority to judge the elections returns and qualifications of its own members); Scott v. Thornton, 234 S.C.

> 19, 106 S.E.2d 446 (1959) (finding the court had no jurisdiction in light of the constitutional provisions that require each house to judge the election returns and qualifications of its own members). Consequently, a court's exercise of jurisdiction over Appellant's ethical complaint against Governor Haley would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers. (citing Art. 1, § 8).

Rainey v. Haley, 404 S.C. 320, 326, 745 S.E.2d 81, 84 (2013) (emphasis added).

While Rainey v. Haley did not directly address your specific question, it does provide instructive guidance with respect thereto. The majority in Haley made clear that "ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview." Id. The Court noted also that it "would . . . violate separation of powers" for any other branch of government to possess power over such investigations. That being the case, the Court clearly suggested that the General Assembly (in this case, the House) possesses jurisdiction with respect to any "ethics investigation" (civil) over former members of the House, such as Governor Haley. Compare Ex Parte Harrell v. Attorney General, 409 S.C. 60, 760 S.E.2d 808 (2014) [House and Senate Legislative committees are charged with the exclusive responsibility for handling ethics complaints but such authority does not limit criminal prosecutions]. While Rainey is somewhat distinguishable for purposes of the Ethics Act, because Governor Haley continued to be a "candidate" at the time, the decision indicates that, whether current members or former members, the respective houses of the General Assembly possess inherent and constitutional power to discipline former members for acts committed while members. See Art. III, § 12.

Also instructive with respect to the inherent powers of legislative bodies is the United States Supreme Court decision in Anderson v. Dunn, 19 U.S. 204 (6 Wheat.) (1821). There, the question was whether the House of Representatives possessed power to punish persons who were not members of the House for contempt. A nonmember had attempted to bribe a House member. It was argued that the provision of the Constitution authorizing each house to discipline its members necessarily implied a lack of authority to punish nonmembers. The Court rejected such an argument, holding that it is the inherent power of all legislative bodies to punish nonmembers for contemptuous behavior before it. According to the Court, "[t]his argument proves too much; for its direct application would lend to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible." 19 U.S. at 232. See also Ex Parte Parker, 74 S.C. 466 (1906) [South Carolina Supreme Court confirms authority of legislative committee to punish a witness for contumnacious behavior]. Thus, there is no question that legislative bodies possess the inherent power to punish nonmembers for contemptuous behavior.

Consistent with these authorities, scholars have written that it has been the historical practice that legislators who have resigned are subject to disciplinary action by their respective bodies for acts committed while a member. As has been noted by one scholar:

> Although resignation from the House does not prevent a censure . . . (and perhaps should not prevent imprisonment by the House . . .), it clearly does prevent expulsion. Insofar as a member has an interest in telling the House, "You can't fire me, I quit!", the House may have an equally strong interest in replying "You can't quit, we've just fired you!" Indeed, we saw exactly this debate play out over the resignation of Benjamin Whittemore (Congressman from South Carolina) in 1870. . . . Whittemore sought to resign precisely to avoid being disciplined over his ethical lapses, and Henry Dawes, arguing against the right of resignation, told the House that "[i]f a member when the Constitution clothes us with the power to punish a member for any offense here, can prevent us from discharging that duty by resigning, whether we will or not, the power of the House to control its own constitution is at an end. . . ." We have seen a similar impulse in the House of Commons, where the Chiltern Hundreds was denied in the mid-nineteenth century to keep members from taking advantage of corrupt compromises. . . . And at least one English-descended legislature refused a resignation in the twentieth century for the same reason – in 1951 the lower house of the Indian parliament refused to allow a resignation when it sought, instead, to expel a member. In short . . . the disciplinary power of the House would continue to extend to actions taken by former members while in office. . . .

Chafetz, "Leaving The House: The Constitutional Status of Resignation From the House of Representatives," 58 Duke L.J. 177, 228 (2008).

The Benjamin F. Whittemore case is particularly instructive. Whittemore, a Congressman from South Carolina, was accused of selling appointments to the Military and Naval Academies. A report regarding Whittemore's conduct was prepared and a resolution of expulsion submitted to the House. While the proceedings were ongoing, Whittemore resigned. Nevertheless, resignation did not deter the House's ability to punish him. As authorities state, the

> [q]uestion then arose as to the adoption of the resolution of expulsion. The precedents in the cases of Messrs. Gilbert and Matteson . . . were cited, in both of which the resolutions of expulsion were not passed after the resignations were tendered. It was stated by Mr. Logan as a precedent that in the case of Mr. Matteson the Speaker of the House refused to decide that the resignation was accepted and submitted the question to the House. Finally, it was decided that the Member had resigned, and the resolution of expulsion was laid on the table. But resolutions condemning the conduct of the Member were adopted.

Hinds, Precedents of the House of Representatives of the United States, § 1373 at 831 (1907).

Another case before the United States Congress involved the punishment of Congressman John T. Deweese of North Carolina. Deweese resigned from the House prior to the infliction of any discipline. However, it was explained on the House floor that the Committee on Military Affairs "would have reported a resolution of expulsion had not the House by its action in a previous case decided against expelling a Member who had resigned." A resolution of "condemnation" was then approved unanimously by the House. Hinds, id. at § 1239. Thus, it cannot be denied that the House possessed the jurisdiction even to expel a member who had resigned.

As another authority has noted, "[w]hen Members have resigned pending proceedings for censure, the House has nevertheless adopted the resolutions of censure. . . ." Jefferson's Manual and Rules of the House of Representatives of the United States, § 63. Thus, the historical practice has been for a legislative body to retain jurisdiction to discipline former members for misconduct committed as a member.

We turn now to an examination of various relevant provisions of the Ethics Act. As you indicate, § 8-13-530(1) and (4) state that the Committee may

> (1) ascertain whether a person has failed to comply fully and accurately with the disclosure requirements of this chapter and promptly notify the person to file the necessary notices and reports to satisfy the requirements of this chapter;
>
> . . . .
>
> (4) receive and hear a complaint which alleges a breach of a privilege governing a member or staff of the appropriate house, the alleged breach of a rule governing a member or staff of or candidate for the appropriate house, misconduct of a member of or candidate for the appropriate house, or a violation of this chapter or Chapter 17 of Title 2.

Further, as you state, House Rule 4.16.B provides in pertinent part that the jurisdiction of the House Ethics Committee is "over individuals and entities pursuant to Chapter 13, Title 8. . . ." [Ethics Act] (emphasis added). The Rule further references that such jurisdiction is over a "member" or "candidate." While the term "individual" is defined by § 8-13-1300(18) as "one human being," the key question here is the meaning of "member" for purposes of the power to punish a former member who has resigned. A "member' is a "public official" for purposes of the Act. A "public official" is defined as "an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for office. . . ." Section 8-13-100(27).

However, the term "member" is not defined by the Ethics Act. In such cases, the Legislature "is presumed to have fully understood the meaning of the words it used in a statute, and unless this meaning is vague or indefinite, [it is presumed] . . . that it intended to use them in their ordinary and common meaning or in their well defined legal sense." Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726, 731 (Ct. App. 2001). Moreover, as a remedial statute (at least in terms of civil jurisdiction), the Ethics Act must be liberally construed in order to effectuate its purpose. S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

Given the fact that the historical practice has been for a legislative body to exercise jurisdiction over former members or nonmembers for purposes of discipline, the General Assembly most probably intended that § 8-13-530(4)'s focus was upon the administration of discipline for conduct occurring at the time the person was a "member" of the House or Senate. Such a reading is consistent with the text of § 8-13-530(4), which is the jurisdictional provision for the House and Senate Ethics Committees. The word "current" as a modifier of the word "member" is not used in that subsection. Moreover, the provision is written so as to indicate that jurisdiction may be assumed for violations by a "member or staff." In other words, it is the time of the alleged violation by a "member" of the House or Senate which gives the Ethics Committee jurisdiction, rather than the fact the person must be a "member" when the complaint is filed. As our Supreme Court indicated in the analogous case in Ferguson, the fact that the person is no longer a judge when proceedings are initiated is "irrelevant." Consistent with historical practice, if the person was a "member" when the alleged violation was committed, that is what gives the Committee jurisdiction.

Case law in other contexts supports such an interpretation. In O'Rourke v. District of Cola. Police and Firefighters Retirement and Relief Bd., 46 A.3d 378 (D.Ct. App. 2002), the Court addressed the question of whether a police officer "loses his eligibility for . . . a pension" where he was terminated from the police force before the Retirement and Relief Board was able to adjudicate his pension. This question raised the issue whether the police officer was a "member" of the retirement system for purposes of disability despite such termination even though he clearly was a member at the time of his injury. The Court concluded that he was, holding that "his active membership in the Metropolitan Police Department at the time his retirement or disability was recommended to the Board was sufficient to preserve his right, upon a determination that he was otherwise eligible, to a disability annuity." 46 A.3d at 380-381.

In the Court's view, the reading by the Retirement and Relief Board that the term "member" was too narrow. The Court's interpretation is instructive:

> [t]he Retirement and Relief Board reads the word "member" . . . restrictively, to include only someone who is a "current member" – as opposed to a "current or former member" – when the administrative decision finally is made whether to retire him on disability. If our analysis not only started, but also ended, with the words of the two statutory sections in question, this

> would be a possible reading. It is not in an obvious or necessary reading, however. "[T]here is not temporal qualifier [of the word "member"] in the statute[s] such as would make plain" that only current members may be retired on disability. . . . The definition of "member" in § 5-701(1) likewise contains no temporal qualifier. Moreover, both § 5-709 and § 5-710 include a provision that plausibly supports the broader reading that a disabled officer need only be an active "member" when the recommendation or application for retirement on disability is submitted to the Board in order to be eligible to receive a disability pension.

46 A.3d at 384 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)) [term "employee" is not limited to a "current" employee].

And, in Appeal of Hildreth, 55 A.3d 1012 (N.H. 2012), the Supreme Court of New Hampshire reversed the decision of the Personnel Appeals Board which had concluded that by resigning as a permanent state employee, the petitioner had relinquished the right to appeal a disciplinary action against her. The Supreme Court disagreed:

> Here, the State does not dispute that the Petitioner was a permanent employee when she received the letters of warning. Rather, the State asserts that "[b]y resigning an employee voluntarily, knowingly, and intelligently gives up the status of 'permanent employee' and any commensurate benefits." We disagree.
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> "Absent an express 'temporal qualifier,' such as 'current,' . . . use of the word 'employees' does not inherently exclude former . . . employees." Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 6 (1st Cir. 1998) (citations omitted).

55 A.3d at 1013.

We note also the South Carolina decision of Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 (1940). There, an action was brought by a taxpayer against former Speaker Blatt and others seeking an adjudication that, as a result of a violation of the dual office holding prohibition in the State Constitution, certain members of the General Assembly had vacated their seats. The Court concluded it was inappropriate to adjudicate the issue because of the principle of separation of powers. The Court explained as follows:

> [i]f any of the defendants have vacated their offices as trustees, under the Constitution, by qualifying for other offices to which they have been elected, or if any of them have vacated other offices by qualifying as trustees, there are doubtless remedies for that situation. Certainly the Legislature is fully empowered to deal with it as to these defendants, who were elected to other offices after being elected trustees for the election of new trustees is the

> function of that body exclusively, and obviously it is beyond the power of this Court to direct the Legislature to perform any duty it may have in that regard.
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> As to the instances of those defendants who were elected to the Senate before being elected as trustees, and to the question whether they have vacated their offices in the General Assembly (which is the sole contention that the plaintiff can make in regard to them), the Constitution expressly prescribes that the Senate and House of Representatives shall be the judges of the qualifications of their own members (Article III, Section 11) and certainly it will not be suggested that this is a field in which the courts may exercise judicial powers to correct either non-action or wrongful action on the part of these legislative bodies. . . .
>
> Just as it is not within the power of the General Assembly to reverse a judicial decision by retroactive legislation, or to otherwise interfere with or nullify the judicial process so it is not within the power of this Court to impinge upon the exercise by the Legislature of a power vested in that body, merely because in the exercise of or failure to exercise that power, son constitutional provision has been violated.

9 S.E.2d at 220.

Conclusion

Rainey v. Haley makes clear that "the South Carolina Constitution . . . [has] expressly recognized and respected the Legislature's authority over the conduct of its members. . . ." In Rainey, the Supreme Court left no doubt that "ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview. . . ."

The United States Supreme Court has also concluded that all legislative bodies possess the inherent power to discipline a nonmember for contemptuous behavior. Moreover, the historical practice of legislative bodies has been to retain and exercise jurisdiction over members who have resigned in order to impose discipline for conduct occurring or misconduct committed while a member. As one authority has stated, if a legislative body loses jurisdiction to discipline a member merely because he or she resigned, "the power of the House to control its own constitution is at an end." We reference herein particularly the Whittemore case in which the United States House disciplined a former member following resignation. We believe that is the appropriate interpretation here.

This historical practice is consistent with that of our Supreme Court which has disciplined both judges and members of the Bar following resignation for conduct occurring while a judge or member of the Bar. As our Supreme Court explained in Ferguson, the fact that the individual is no longer a judge when proceedings are initiated is "irrelevant." What is

important is that the individual was a "member" at the time the alleged conduct occurred. Also instructive is the authority which states that where a mandamus writ is served upon a public officer who then fails to obey, "the later resignation from office will not exempt the officer from punishment for the disobedience prior to the resignation." 59 C.J.S. Mandamus § 445.

Section 8-13-530(4) of the Ethics Act bestows civil jurisdiction upon the Ethics Committee of each house for certain offenses, including misconduct, as well as any violation of the Ethics Act. This subsection does not use the word "current" as a modifier of the word "member." Moreover, consistent with historical practice, the provision is written in such a way that it appears to link the misbehavior to the time of the person's membership in the body rather than to the time of filing of a complaint before the Committee. In other words, rather than relating membership to the point in time when a complaint is filed, the Act is written such that the punishable conduct is tied to membership at the time such conduct is committed. The result is that § 8-13-530(4) appears to bestow jurisdiction over former members who are alleged (in the complaint) to have committed punishable acts while members. Rules of the House, Rule 4.16.B is consistent therewith. Case law has also interpreted analogous situations in this same way. See In The Matter of Ferguson, supra.

Thus, in our opinion, there is sufficient legal authority available to the Committee to assert jurisdiction over a member who has resigned at the time proceedings are commenced, but who is alleged to have committed acts as a member which are subject to the discipline of the Committee and the House, pursuant to § 8-13-530(4).

However, we are also of the opinion, as Rainey v. Haley has concluded, that the decision of whether or not to proceed against either a former member or a former candidate for disciplinary purposes for acts committed while a member is solely the prerogative of the House and its Ethics Committee. As the Court concluded in Culbertson v. Blatt, the determination as to whether a member of the House or Senate has vacated his or her seat lies exclusively with the House or Senate and is not reviewable by the courts. So too with regard to the decision to proceed against a former member for internal disciplinary action. Thus, while there is sufficient legal authority to exercise jurisdiction, it would be up to the House Ethics Committee, within its discretion, as to whether to proceed in this circumstance.

Sincerely,

Robert D. Cook
Solicitor General