ALAN WILSON
ATTORNEY GENERAL

June 3, 2011

The Honorable Nikki R. Haley
Governor, State of South Carolina
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Governor Haley:

You seek a formal opinion "regarding the Governor's authority under Article IV, Section 19 of the South Carolina Constitution to convene the General Assembly in extra session." You further note the following, by way of background:

> As you know, based on an opinion issued by Attorney General Travis Medlock to Governor Dick Riley in 1984 (1984 S.C. Op. Atty. Gen. No. 84-73), I issued Executive Order 2011-13 to require the General Assembly to convene June 7, 2011 at 10:00am even though it has not adjourned *sine die*. The 1984 opinion states as follows: "You have asked whether the Governor may call a special session when the General Assembly has adjourned, but has not yet adjourned sine die. It is our opinion that the Governor possesses such power."
>
> Accordingly, I am asking your opinion on the following question: Do you reaffirm the 1984 opinion as it relates to Executive Order 2011-13? If so, please explain why any new laws related to the General Assembly's authority to adjourn and adopted since 1984 do not conflict with my authority to require the General Assembly to convene in extra session pursuant to Article IV, Section 19.

Law / Analysis

In General Medlock's 1984 Opinion, we stated as follows:

Article IV, § 19 of the Constitution of South Carolina provides in pertinent part:

> The Governor may on extraordinary occasions convene the General Assembly in extra session.

Based upon such authority, it is recognized that 'the governor has power to call a special session, though the legislature, not having adjourned *sine die*, is still in general session.' 72 Am.Jur.2d *States*, § 59. The Wisconsin Supreme Court has held with respect to a constitutional provision authorizing the Governor to call special sessions that:

> The constitution does not limit the power of the governor to call special sessions only when the legislature is not in session. The purpose of a special session is to accomplish a special purpose for which it is convened. To deny the governor the power to call a special session while the legislature is in general session would in effect deny the governor the right to call the legislature into session to give priority consideration to those items he claims are of immediate statewide concern.

State ex rel. Groppi v. Leslie, 44 Wis. 282, 171 [N.W.2d] 192, 200 ([1969]). And it has been held that 'extra' sessions are virtually synonymous with 'special' sessions. 81A C.J.S. *States*, § 49. In other words, 'the governor may convene the legislature into a special session during the recess of a regular term.' 81 A C.J.S. *States*, § 49.

Moreover, it is generally recognized that

> If, in authorizing the governor to convene the general assembly on extraordinary occasions, the Constitution does not define what shall be deemed an extraordinary occasion for this purpose or refer the settlement of that question to any other department or power of the government, the governor alone is the judge, and although he errs, the courts have no jurisdiction to review his decision or correct his error.

72 Am.Jur.2d *States,* § 59.

Thus, it is our opinion that the Governor may, pursuant to Article IV, § 19 convene the General Assembly into extra session and his decision to do so is within his discretion conclusive and not reviewable.

As we understand the current situation, pursuant to Art. III, § 9 of the South Carolina Constitution, the General Assembly has adopted a *sine die* resolution extending the session beyond the mandated *sine die* adjournment date of 5 P.M. on the first Thursday in June for certain specific purposes. See S.C. Code Ann. Section 2-1-180. It is our further understanding that the General Assembly is currently in recess (or has adjourned) and that such action was taken pursuant to Art. III, § 9 of the South Carolina Constitution which provides in pertinent part as follows:

> [a]fter the convening of the General Assembly, nothing in this section shall prohibit the Senate or the House of Representatives, or both, from receding for a time period not to exceed thirty consecutive calendar days at a time by a majority vote of the members of the body of the General Assembly seeking to recede for a time period not to exceed thirty consecutive calendar days, or from receding for a time period of more than thirty consecutive calendar days at a time by two-thirds vote of members of the General Assembly seeking to recede for more than thirty consecutive calendar days at a time.

We understand the General Assembly now stands in recess until June14, 2011 and will then take up the agreed upon subjects in accord with the *sine die* resolution. The date for *sine die* adjournment is, as we understand, December 1, 2011.

The foregoing part of Art. III, § 9 was inserted by the people in 2006 and was ratified in 2007. The question has arisen as to whether Art. III, § 9, as amended, now alters the Governor's powers to convene on "extraordinary occasion" the General Assembly into extra session. There are no South Carolina cases which construe Art. III, § 9, as amended, in 2007, nor are there any South Carolina Court decisions interpreting Art. IV, § 19 in the context of the circumstances addressed in the 1984 opinion. Of course, only a court may construe with finality these two constitutional provisions. However, it is our opinion that a court would likely conclude that the two provisions of the Constitution involve separate, independent powers of the General Assembly and the Governor, and do not conflict with one another. Accordingly, we believe that the 1984 Opinion expresses the existing law in this novel area, and thus we reaffirm that Opinion today.

Our Supreme Court has concluded that all sections of the constitution must be considered together and harmonized, if possible. *Lee v. Clark*, 224 S.C. 138, 77 S.E.2d 485 (1953); *Knight v. Hollings*, 242 S.C. 1, 129 S.E.2d 746 (1963); *Gaud v. Walker*, 214 S.C. 451, 53 S.E.2d 316 (1949). In this instance, we believe Art. III, § 9 and Art. IV, § 19 may be harmonized and a court would so conclude. Art. III, § 9 addresses the General Assembly's power to recede generally and Art. IV, § 19 addresses the Governor's authority to convene an extra session of the General Assembly on "extraordinary occasions." Those are separate powers of two independent branches of government and address separate circumstances. Thus, in our view, a court would likely find these two constitutional provisions not to be in conflict with each other.

We have also surveyed the existing jurisprudence since the 1984 Opinion was written, and found the case law in other jurisdictions to be unchanged. In 72 Am.Jur.2d, *States*, Etc. § 46, it is currently stated:

> [a] governor has been deemed to have the power to call a special session under such a provision even if the legislature, not having adjourned *sine die*, is still in general session.

The decision cited in this treatise for the foregoing proposition of law is the same case General Medlock referenced in 1984, *State ex rel. Groppi v. Leslie*, 44 Wis.2d 282, 171 N.W.2d 192 (1969). In *Groppi*, a protestor held in contempt of the Legislature challenged the validity of the contempt on the basis that the Governor possesses no power to convene an extra session *except after sine die* adjournment. The Wisconsin Supreme Court rejected such argument and upheld the contempt. See also, *Opinion of the Justices*, 249 Ala. 153, 30 So.2d 391 (1947) [stating that, in accordance with *Opinion of the Justices*, 222 Ala. 353, 132 So. 311 (1931), that in the case of a lengthy recess of the regular session of the Legislature, the Governor may, if an emergency should arise, convene the Legislature in extra session during a recess of the regular session].

The 1984 Opinion did not address the question of what constitutes an "extraordinary occasion" for purposes of the Governor convening an extra session of the General Assembly. Nor could we render such an opinion as to what is or is not an "extraordinary occasion" in a given instance because such is a factual question which is beyond the scope of an opinion of this Office. *Op. S.C. Atty. Gen.*, March 19, 2008. The 1984 Opinion noted, however, that such a decision regarding what is and what is not "extraordinary" is one largely committed to the Governor's discretion. For example, in *Gevendan v. Commonwealth*, 142 S.W.3d 170 (Ky. 2004), the Kentucky Court of Appeals concluded that the Constitution's separation of powers doctrine barred an injunction compelling the governor to call the legislature into executive session to consider a budget bill. Referencing earlier court decisions, the Court stated that

> [w]hether to summon an Extraordinary Session of the General Assembly and what matters are to be addressed at such a session are questions entrusted to the discretion of the Governor under Section 80 of our State Constitution.

142 S.W.2d at 172. *See also Herberger v. Kelly*, 366 Ill. 126, 7 N.E.2d 865 (1937) [the words "extraordinary occasions" are "not defined in the Constitution ... . [B]y settled usage and custom, the expression has been taken to afford ample authority for the executive in the exercise of his discretion, to convoke a special session of the legislative branch of government to act upon any subject which, individually, he deemed of importance for the welfare of those he serves."]. In passing, our own Supreme Court noted that the term "extraordinary occasions" should "be devoted to the unexpected causes which had necessitated such a measure." In the Court's language, such situation related to the "unforeseen" situation. *Arnold v. McKellar*, 9 S.C. 335, 343 (1878). Again, the determination of what is an "extraordinary occasion" is, by the Constitution's Art. IV, § 19, largely committed to a determination by the Governor, subject, of course, to judicial review.

Conclusion

In our opinion, the 1984 Opinion of General Medlock accurately stated the law as it existed at the time the opinion was written. Since that time, we understand the Opinion has been relied upon by subsequent Governors in a variety of situations to convene the General Assembly into extra session prior to *sine die* adjournment. Although Art. III, § 9 has been amended since the 1984 Opinion was written, we believe a court would reconcile Art. III, § 9 together with Art. IV, § 19 into a harmonious whole. Therefore, the Governor's power, as recognized in the 1984 Opinion, in our view, remains the same.

With respect to an interpretation of what is or is not an "extraordinary occasion," we cannot address such situation in an opinion of this Office because determination of the applicability of "extraordinary occasions" in a given instance is a question of fact beyond the scope of an opinion, For purposes of Art. IV, § 19, it has been held by most courts that such interpretation is largely committed to the Governor's discretion, and out of respect for the separation of powers, courts generally will not interfere with such discretion. Of course, such judicial review is a question which only the courts may decide in a given circumstance.

Accordingly, we today reaffirm our 1984 Opinion by General Medlock.

Sincerely,

Alan Wilson

Alan Wilson

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