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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

March 4, 2003

The Honorable Scott H. Richardson
Senator, District No. 46
52 North Calibogue Cay
Hilton Head, South Carolina 29928

Dear Senator Richardson:

You have requested "a formal opinion as to whether the current method by which the General Assembly elects in joint session is constitutional." By way of background, you state the following:

> The General Assembly currently elects judges, commissioners, trustees and others in Joint Session. However, the Constitution and accompanying enabling statutes are silent as to the manner of these elections. Tradition has mandated that the elections be held with the total vote of Senators and Representatives in attendance with a majority required for election. However, the tradition was born when Senators were elected based upon territory rather than population and in the interim that method was changed by the Courts. Therefore, the basis of the tradition of our method of voting is no longer vested in the traditions of representation by membership in the House and Senate. Thus, a situation exists where the House of Representatives with 124 votes of a total of 170 dictates unilaterally the election of each elected position. I find it inconceivable that our framers could have envisioned a system whereby a co-equal part of the General Assembly was in essence disenfranchised in the joint election of officers.
>
> I am concerned that with the recent decision of cases such as Vander Linden and with the proliferation of one man one vote challenges to similar manners of election that our system of joint session elections could be challenged under a one man one vote lawsuit. Vander Linden did not squarely address the issue of actions by the General Assembly because the issue was not before the Court in that matter. However, I believe that the rationale of the Court regarding votes taken by legislative delegations is telling. In those cases, the Court held that in order to comply with the strictures of one-man one vote that the votes of delegation members had to be weighted to account for their proportional representation. The decision of the Court in that case raises the same seminal question that is of concern. To wit, must votes

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of members of the General Assembly be weighted proportionally to avoid constitutional scrutiny?

Law / Analysis

We begin with the legal proposition that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "presumed to have acted within ... [its] constitutional power despite the fact that, in practice, ... [its] laws result in some inequality ...." State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office may strike down an act of the General Assembly as unconstitutional. While this Office may comment upon an apparent unconstitutionality, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

The presumption of validity given legislative acts and actions likewise attaches to any claim that the Legislature has failed to meet the constitutional requirements of "one person, one vote" under the Equal Protection Clauses of the federal and state Constitutions. See, LaValle v. Hayden, 696 N.Y.S.2d 782 (1999). See also, Swann v. Adams, 385 U.S. 440, 446, 87 S.Ct. 569, 573, 17 L.Ed.2d 501 (1967) (Harlan and Stewart, J., dissenting) [state, as well as federal enactments, bring "a strong presumption of regularity and constitutionality."]

Particularly where state legislative apportionment is questioned, the presumption of constitutionality is given great weight. The Supreme Court of the United States has recognized that "... more flexibility [is] ... constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting." Mahan v. Howell, 410 U.S. 315, 320, 93 S.Ct. 979, 983, 35 L.Ed.2d 320 (1973), citing, Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). As the Court recognized in Sims, "legislative reapportionment is primarily a matter for legislative consideration and determination." 377 U.S. at 586.

In addition, "[i]t is a generally recognized and accepted rule that a construction of the Constitution adopted by the Legislative department and long accepted by the various agencies of government and the people is, where the language construed is capable of two interpretations, entitled to great weight." Weeks v. Ruff, 164 S.C. 398, 162 S.E. 450, 452 (1932), quoting Cooley's Constitutional Limitations, (8th ed.), pp. 147, 148. The "construction placed by the Legislature upon

its own procedure for so many years should be regarded as the correct interpretation." Thompson v. Livingston, 116 S.C. 412, 107 S.E. 581, 583 (1921).

"Elections" By Legislature in Joint Assembly

With these underlying principles in mind, we recognize that for many, many years, the General Assembly has "elected" public officers such as judges, commissioners, trustees, etc. through a joint assembly. This process has traditionally consisted of the Legislature convening as one body with a majority of that body controlling. While oftentimes this selection method is referred to as an "election," it is in reality an appointment by a body acting collectively – in this instance, the House and Senate sitting as one. Legislative appointment is authorized both by the State Constitution as well as statutory enactments. These provisions employ slightly differing phraseology, but all to the same end – appointment by the Legislature in joint assembly.

Art. V, § 3 of the Constitution, for example, provides that "[t]he members of the Supreme Court shall be elected by a joint public vote of the General Assembly ...." Art. V, § 8 employs the same language for appointment of the members of the Court of Appeals. Art. V, § 13 requires election of circuit judges, using identical phraseology. See also, § 14-8-20 ["joint public vote of the General Assembly" for members of Court of Appeals].

Slightly varying language is employed by the General Assembly with respect to the election of other officers. For example, § 1-23-510 requires election of members of the Administrative Law Division "by the General Assembly in joint session ...." Similarly, the statute requiring election of members of the Legislative Audit Council specifies that such occur "in joint session." Other provisions use this same language. See, Art. IV, § 5 of South Carolina Constitution [in event of tie vote for Governor, "the General Assembly in joint session shall elect the Governor from the candidates having received the tie vote by the affirmative vote of a majority of the combined membership of both houses."]; § 41-29-10 [Employment Security Commission "elected by the General Assembly in joint session ...."].

A third example of phrasing is found in § 59-19-10 creating the Old Exchange Commission. Three members of the Commission are to be "elected by the House of Representatives and Senate in joint assembly." Section 59-123-40 also provides that twelve members of the MUSC Board of Trustees must "be elected by the General Assembly in joint assembly ... ."

Election or appointment by the Legislature in joint assembly is by no means a recent occurrence. For over two centuries, the State Constitution and statutes have required that the General Assembly appoint public officers of every variety by such "joint" action. Again, even though slightly varying language has been used in the authorizing provision, the method for selection has, as you indicate in your letter, been the same – appointment by the Legislature sitting as one entity in joint assembly. For example, pursuant to an 1812 Act, Registers of Mesne Conveyances, Masters, and Commissioners of the Courts of Equity were "elected by joint ballot of both branches of the Legislature." See, Ex Parte James W. Gray, 8 S.C. Eq. 77 (1830). The Constitution of 1790

mandated that "the Judges of the Superior courts, the commissioners of the treasury, secretary of state and surveyor general shall be elected by the joint ballot of both houses in the house of representatives ... ." See, State v. McClintock, 12 S.C. 245 (1821). Indeed, pursuant to Art. II, § 1 of the South Carolina Constitution of 1790, and until 1865, the Governor of this State was selected by the General Assembly in joint assembly ["the senate and house of representatives shall, jointly, in the house of representatives, choose by ballot a governor. ..."]. Regardless of the language used, however, the Legislature has interpreted the particular provision as authorizing it to act in a single body, in joint assembly. As you correctly note in your letter, "[t]radition has mandated that the elections be held with the total vote of Senators and Representatives in attendance with a majority required for election." We are unaware of any variation in this practice and interpretation by the General Assembly.

A good example of the "election" procedure which has, historically, been conducted by the General Assembly is discussed in State v. Shaw, 9 S.C. 94 (1878). In Shaw, the Court reviewed the meaning of the words "joint ballot" as used in the 1868 Constitution requiring the election of circuit judges by "joint ballot of the General Assembly." The Court explained that

> [w]ere the last Section considered alone, there could be no doubt about its meaning. "Elected by the two houses of the General Assembly met in joint assembly – voting by ballot." The word "joint" of necessity qualifies the "General Assembly," for were it made to qualify the word "ballot," it would lead to the absurdity of saying "vote by a joint ballot or ticket," which is impossible. We are forced to adopt the plain meaning established by the common use of the words, by parliamentary usage and by legislative enactment, all concurring. Indeed, the phrases quoted by counsel, "by joint ballot," by ballot jointly," "jointly by ballot," and "joint ballot" in connection with elections by the two houses of the General Assembly, have interchangeably been so used, and with undoubted signification from the time of the Constitution of [1778] ... to the time of the Constitution of 1868.

9 S.C. at 135. In concurrence, Justice McIver noted that "... it is quite obvious that the phrase 'joint ballot' means jointly by ballot, just as the phrase 'joint vote' means jointly by vica voce vote. In other words, that the word joint was inserted in each instance merely for the purpose of showing that the two branches of the body ... should act together, and not separately, as they do in performing their usual and ordinary duties." Id., at 144.

In short, since virtually the State's founding, and notwithstanding the use of slight variations in the particular language in the Constitution and various statutes, the General Assembly has appointed officers such as judges, trustees, governors, registers, etc. in "joint" assembly or session; in so doing, the Legislature has consistently convened as a unicameral body, selecting the particular individual based upon a majority of that single body. The appointment of judges is a notable example. According to the Journals of the South Carolina House of Representatives, judges have been elected in joint assemblies in this state at least since 1783, even though the precise language of the State Constitution regarding selection of judges has been altered from time to time. This

methodology is in keeping with the general law and legislative practice in the United States. Mason's Manual of Legislative Procedure, for example, states:

> 1. The two houses of a legislature have the right to sit in joint session for certain purposes, but the right so to sit is a limited constitutional right and cannot be augmented by the legislature.
>
> 2. Once the Senate and House have convened in joint session, the members then become a single body, with a majority of all members of both houses constituting the quorum, with each member entitled to an equal vote with every other member.
>
> 3. When the two houses meet in joint session, they in effect merge into one house, where the quorum is a majority of the members of both houses, where the votes of members of each house have equal weight and where special rules can be adopted to govern joint sessions or they can be governed by the parliamentary common law.

Id. at 782 (1979). See also, Schumaker v. Edington, 152 Iowa 596, 132 N.W. 966, 969 (1911) ["'Joint,' according to the lexicographers means united or combined, and the law contemplated that whatever the boards did must have been by them united or combined, and acting as one body."] Based upon these authorities, this consistent and longstanding interpretation of both the Constitution and statutes by the Legislature, would, in our opinion, be considered by the courts as correct.

Requirement of "One Person, One Vote"

Given this background, we now turn to the issue of whether the General Assembly's "election" or appointment of public officers in joint assembly or as a unicameral body violates the Equal Protection Clause of the federal Constitution. In the landmark decision of Reynolds v. Sims, supra, the United States Supreme Court recognized that "if a State should provide that the votes of citizens in one part of the state should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. ... Overweighting and overvalution of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." 377 U.S. at 562. In the view of the Court in Reynolds, such discrimination denied voters equal protection of the laws or, as the Court put it "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment as much as invidious discrimination based upon factors such as race." 377 U.S. at 565. Therefore, the Supreme Court held, "the Equal Protection Clause requires that the State make an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as practicable." 377 U.S. at 577.

Subsequent to Reynolds, the Court applied the principle of "one person, one vote" to local government in Hadley v. Jr. College Dist. of Metro. Kansas City, 397 U.S. 50, 56, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970). Hadley held that

> ... whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

397 U.S. at 56. Hadley, however, also recognized that the "one person, one vote" requirement is not applicable in all instances. The Court noted that

> where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws.

Id., at 58. Selection by appointment, therefore, does not constitutionally require weighted voting.

In Fortson v. Morris, 385 U.S. 231, 87 S.Ct. 446 (1966), the Court squarely addressed selection by appointment rather than by popular election. The Georgia Constitution required that the state legislature appoint the governor when no candidate for that office received a majority of the votes at a general election. In such event, a majority of the General Assembly "elected" or, more properly, appointed the governor. This provision was challenged before a three judge court which struck down as unconstitutional the Georgia constitutional provision, concluding that Georgia voters were denied equal protection because "one man, one vote" principles were not adhered to in the Georgia legislature's selection. The lower court relied upon Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). Gray had held that Georgia's county unit system, by which state officials were elected by a majority of counties voting as units rather than by a majority of voters was unconstitutional. Likewise, in the three judge court's opinion, the Georgia Constitution in requiring the Governor to be elected in joint assembly of the Legislature "permits unequal treatment of the voters within the class of voters selected ...." Morris v. Fortson, 262 F. Supp. 93, 95 (N.D. Ga, Atlanta Div. 1966). However, the United States Supreme Court reversed the three judge panel, holding that

> [t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. A method which would be valid if initially employed is equally valid when employed as an alternative.

385 U.S. at 232. Fortson thus stands for the proposition that the federal Equal Protection Clause is no bar to appointment in joint assembly of the Governor of the State by the Legislature notwithstanding the fact that the vote of each legislator is not proportionally weighted to the number of voters represented.

Likewise, in Sailors v. Bd. Ed. of County of Kent, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967), an Equal Protection challenge was made to the appointment method of selection of the county school board based upon "one person, one vote" principles mandated by Reynolds v. Sims. However, the Supreme Court again rejected the argument, concluding that, because the school board was appointed rather than popularly elected, "one person, one vote" was inapplicable.

The facts were that the school board was "chosen not by the electors of the county, but by delegates from the local boards." Id. Each local board provided a delegate to a biennial meeting and the delegates then elected county board members from nominees of school electors. A three judge court concluded that this method of selection did not violate the Fourteenth Amendment.

The United States Supreme Court agreed. The Court noted that its previous rulings in this area "were all cases where elections had been provided and cast no light on when a state must provide for the elections of local officials." 387 U.S. at 107. Michigan had adopted a "system for selecting members of the county school board [which was] ... basically appointive rather than elective." Id., at 109. In the Court's opinion, therefore, "[s]ince the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man one vote' has no relevancy." Id.

Vander Linden Case

We turn now to the Fourth Circuit Court of Appeals decision in Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999). In Vander Linden, Plaintiffs attacked the constitutionality of South Carolina's legislative delegation system as violative of the Equal Protection Clause. As the Court described, "[t]he legislators thus elected from each county constituted the county's legislative delegation." It is well documented that, for decades, the "legislative delegation" served as the main form of local government in South Carolina. The Fourth Circuit characterized the system as one which "[i]n practice, [consisted of] local legislation [which] was formulated by the legislative delegation for the relevant county and then enacted by the General Assembly at large with no scrutiny." Id. at 269. In the words of the District Court, the county delegation "'in addition to being State legislators ... were effectively, the county legislature and governing board.'" Id. Plaintiffs' constitutional challenge was thus based upon the following contention:

> [t]he voters maintain that because each member of a county legislative delegation has one vote regardless of how many of the member's constituents live in the county, the delegation system dilutes the voting power of county residents from more populous areas. The system, according to the voters, thus violates the one person, one vote

> requirement that the Supreme Court has held derives from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

193 F.3d at 271. The District Court rejected plaintiffs' constitutional arguments. In part, the District Court's rationale was based upon the Sailors decision of the United States Supreme Court, referenced above. In addition, the District Court reasoned that members of the county delegation are not elected to the delegation as such, but serve on the delegation as part of their legislative duties.

However, the Fourth Circuit reversed. Writing for the majority, Judge Motz relied heavily upon Board of Estimate v. Morris, 489 U.S. 688, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989) in rejecting the District Court's analysis. Morris involved the constitutionality of the structure of New York City's Board of Estimate whose membership included the city's five borough presidents, each of whom was elected from his or her respective borough. Each borough possessed one vote even though the population varied widely. The United States Supreme Court held that the Board of Estimate was in fact a popularly elected body and thus "one person, one vote" principles applied. The Fourth Circuit thus reasoned that "[m]embers of South Carolina's legislative delegations, like members of the Board of Estimate in Morris, are popularly elected to other offices and, in the same way that the officials in Morris became Board members, become delegation members as a matter of law 'upon their various elections.'" 193 F.3d at 274.

The Fourth Circuit's majority rejected the District Court's reasoning that Morris was readily distinguishable because the Board of Estimate in Morris exercised broad governmental powers while the county delegations performed only limited functions. Even if one focused solely upon the delegation's appointment power, in view of the fact that the delegation makes numerous appointments, concluded the Fourth Circuit, "[i]t cannot seriously be contended that the power to appoint governmental officials fails to qualify generically as a governmental function." 193 F.3d at 275. Nevertheless, the Court also found that legislative delegations in South Carolina perform numerous other functions, including the power to approve payment of certain funds, budget approval in particular instances, the power to initiate referenda in limited circumstances, etc. Thus, in the majority's view, there was "little difficulty concluding that the legislative delegations exercise 'governmental functions' ... ." Id., at 277. To the majority's mind, therefore, the "one person, one vote" requirement applies to them." Id., at 280. Accordingly, because the votes of the members of the county legislative delegations were not proportionally weighted in terms of the number of voters represented, the Fourth Circuit found the delegation system "to be unconstitutional."

Judge Niemeyer filed a vigorous dissent. In part, his dissent relied upon Sailors in concluding that the legislative delegation system was not unconstitutional. Judge Neimeyer reasoned that

> [t]he majority fails to appreciate Sailors ' applicability in this context. The majority reasons that because members of the South Carolina legislative delegations are elected rather than appointed, Sailors does not apply. But that misses entirely the

> pertinence of Sailors. The South Carolina legislative delegations are not analogous to the appointed county school boards in Sailors; they are analogous to the elected local school boards in Sailors. Just as the elected local school boards appointed the county school boards in Sailors, the South Carolina legislative delegations appoint various governmental officials in South Carolina counties. In both cases, the appointing officials--members of the local school board appointing authority in Michigan and of the legislative delegations in South Carolina--were elected by districts of unequal populations. Nevertheless, the Supreme Court held that one-person, one-vote principles have "no relevancy" to this scheme. Sailors, 387 U.S. at 111, 87 S.Ct. 1549. The distinction between Sailors and Board of Estimate v. Morris, 489 U.S. 688, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989), on which the majority so heavily relies, is that in Sailors, elected officials only appointed other public officials to carry out administrative and non-legislative functions, whereas in Board of Estimate, elected officials themselves served as a body constituted to exercise governmental functions. The holding of Board of Estimate is simply not apposite on the issue of whether appointment powers are governmental functions restricted by one-person, one-vote principles.

193 F.3d at 286.

Other Authorities Concerning Inapplicability of One Person, One Vote Principles to Appointments Made By Legislature in Joint Assembly

In addition to the United States Supreme Court decisions such as Fortson and Sailors, discussed above, other authorities conclude that "one person, one vote" principles are inapplicable to appointments made by the Legislature in joint assembly. In Shanker v. Regents of University of State of N.Y., 275 N.Y.S.2d 646 (1966), plaintiff alleged that New York's system in which the Legislature appointed a Board of Regents from specific areas of the state violated "one person, one vote" principles. However, the Court concluded that "[t]here is no constitutional requirement on the Legislature to place any geographical limitations on the selection of any members of the Board of Regents." The Court found that plaintiff "cannot now vote for any member nor does he contend he is entitled to such a right." 275 N.Y.S.2d at 85. In short, because the Legislature appointed the Board of Regents, "one person, one vote" was deemed inapplicable.

The same conclusion was reached in MacKenzie v. Travia, 286 N.Y.S.2d 965 (1968) regarding application of "one man, one vote" principles to the Board of Regents. Citing Shanker and Sailors, among other authorities, the Court concluded:

> [f]or the reasons stated, the principle of 'one man, one vote' has no relevancy here. See, also: Sailors v. Kent Board of Education, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650; Lynch v. Torquato, 3 Cir., 343 F.2d 370, 372; Kail v. Rockefeller, May 1, 1967, D.C., 275 F.Supp. 937; Davis v. Sullivan Co. Dem. Comm., 47 Misc.2d 60,

> 261 N.Y.S.2d 697. There is no provision of law permitting or requiring the application of a weighted voting system to such a joint session. (emphasis added).

286 N.Y.S.2d at 966.

A third challenge based upon the "one person, one vote" rationale was made to the selection process of the New York Board of Regents in LaValle v. Hayden, supra and was once again rejected. There, the Court succinctly disposed of the argument by stating that "[i]t has been held that the 'one man, one vote' principle is not applicable to the election of members of Board of Regents (see MacKenzie v. Travia, 55 Misc.2d 1016, 286 N.Y.S.2d 965 (1968); see also, Shanker v. the Regents of the Univ. of the State of New York, 27 A.D.2d 84, 275 N.Y.S.2d 646, supra)." 696 N.Y.S.2d at 791.

Similarly, the Maryland Attorney General refused to apply these requirements of federal equal protection to the Legislature's appointment of the State Treasurer. In 72 Md. Op. Atty. Gen., 125 (Op. No. 87-002, January 19, 1987), the Attorney General reasoned that

> [t]he one-person, one-vote doctrine assures that legislative bodies are apportioned so that no citizen's right to vote is effectively diluted. Reynolds v. Sims, 377 U.S. 533, 562 (1964). The apportionment of the Maryland General Assembly comports with this requirement. See In re Legislative Redistricting, 299 Md. 658 (1982). Hence, every citizen in this State will be equally represented in the vote for Treasurer.
>
> In any event, the doctrine has been held by the Supreme Court to be inapplicable to a state's selection of an official through the joint vote of its legislature. Fortson v. Morris, 385 U.S. 231 (1966). As one treatise has summarized the point:
>
> > "The state can choose to appoint members to an official position rather than elect them. If there is no popular election, the one-person, one-vote rule does not apply." 2 Rotunda, Nowak, & Young, Treatise on Constitutional Law §§ 18.36, at 658 (1986).

The ruling by the South Carolina Supreme Court in Moore v. Wilson, 296 S.C. 321, 372 S.E.2d 357 (1988) is also in accord. In Moore, the Court concluded that the mandate of "one person one vote" did not apply to the selection of a district highway commissioner by a joint delegation of county legislators. The joint delegation was comprised of Edgefield County's two legislators, Lexington County's ten legislators, McCormick County's two and Saluda County's two. It was argued that § 57-3-220 unconstitutionally violated the Equal Protection Clause by requiring the Highway Commissioner to be chosen by a majority vote of the members of the county legislative delegations representing the district from among three suitable persons nominated by the Edgefield legislative delegation. Rejecting the argument that the selection process contravened principles of "one person, one vote," the Court concluded:

> [i]n situations involving popular elections, the State is required to ensure that each person's vote counts, as much as possible, as much as any other person's. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). However, where the State chooses to select members of an official body by a method other than by popular vote, the principle of one man, one vote has no relevancy. Sailors v. Board of Education of County of Kent, 387 U.S. 105, 87 S.C. 1549, 18 LED.2d 650 (1967). In the present case, the selection of a highway commissioner is not made by voters in a popular election. Instead, the selection is made by members of the joint legislative commission and the principle of one man, one vote, is therefore inapplicable.

296 S.C. at 324 (emphasis added). Even though Moore was decided prior to the United States Supreme Court's decision in Board of Estimate v. Morris, supra, it is probable that our Supreme Court would follow Sailors, just as Judge Neimeyer did in his dissent in Vander Linden. Based upon Moore, it appears that our Supreme Court might well not follow Vander Linden's reasoning that "one person, one vote" is controlling with respect to legislative delegations.

Likewise, this Office has similarly opined in the context of appointment by the General Assembly in joint assembly of members of the Public Service Commission. In Op. S.C. Atty. Gen., Op. No. 94-20 (March 14, 1994), we stated that

> [w]hile members of the PSC are elected to their offices by the General Assembly, such election is not the type of popular election which triggers the application of the equal protection principle of "one man, one vote." A strict legal reading of the case law to date reveals that "one man, one vote" has not been applied to appointed (i.e., not popularly elected) boards. Sailors v. Kent Board of Education, 387 U.S. 105, 87 S.C. 1549, 18 L.Ed.2d 650 (1967); Moore v. Wilson, 296 S.C. 321, 372 S.E.2d 357, reh. den. 296 S.C. 326, 372 S.E.2d 360 (1988).

Conclusion

Based upon the foregoing authorities, it is our opinion that a court would conclude that the appointment (or so-called "election") of public officers such as judges, college and university trustees, and commissioners by the General Assembly in joint session is constitutional. In our opinion, the courts would hold that the United States Supreme Court decisions of Fortson v. Morris, supra and Sailors v. Kent County Board of Education, supra – cases which held that the Equal Protection principles of "one person, one vote" are inapplicable to the selection of nonlegislative officials by appointment rather than popular election – are controlling here. The Fortson case is particularly persuasive. In that case, the United States Supreme Court ruled that proportionally weighted voting was not required with respect to the Georgia legislature's appointment in joint assembly of the Governor of the State.

It is undeniable, as you point out, that in Vander Linden v. Hodges, supra, the Fourth Circuit imposed the "one person, one vote" requirements of the Equal Protection Clause upon South Carolina legislative delegations. As you suggest, the Vander Linden situation might be likened to the full Legislature's convening in joint assembly to make judicial and other appointments. However, the United States Supreme Court has never ventured nearly as far as the Fourth Circuit did in Vander Linden. Moreover, by following the Sailors case and concluding that "one person, one vote" principles were irrelevant to appointments made by legislative delegations, our own Supreme Court in Moore v. Wilson took the same path as did Judge Neimeyer in his dissent in Vander Linden. In our opinion, the courts would deem the situation you raise to be much closer to the Supreme Court's decision in Fortson than to the Fourth Circuit's decision in Vander Linden.

In other words, the case law which has considered the question of the constitutionality of an appointments process which utilizes the full Legislature's convening in joint assembly as one body to make an appointment has upheld the process as constitutionally valid. The Courts have concluded that nothing in the federal constitution precludes selection of officers by using this appointment method. Thus, based upon present jurisprudence, we cannot conclude that a court would extend Vander Linden's reasoning to the situation raised by your question.

The system of appointment by the General Assembly in joint assembly has existed unchallenged for over two centuries, since this State was founded. As the Supreme Court of the United States has recognized, while "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees," at the same time, "'an unbroken practice ... is not something to be lightly cast aside.'" Marsh v. Chambers, 463 U.S. 703, 790, 103 S.Ct. 3330, 3335, 77 L.Ed.2d 1019 (1983), citing Waltz v. Tax Comm., 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). Thus, we cannot conclude that a court would set this selection method aside as unconstitutional. Accordingly, it is our opinion that unless a court concludes otherwise, the present system of "electing" judges and other public officers in joint assembly of the Legislature may continue to be followed.

Yours very truly,

Henry McMaster