ALAN WILSON
ATTORNEY GENERAL

December 1, 2017

The Honorable Joshua A. Putnam, Member
South Carolina House of Representatives
District No. 10
436-D Blatt Building
Columbia, SC 29211

Dear Representative Putnam:

You have requested an opinion of this Office regarding the constitutional requirement to affix the Great Seal of the State upon a legislative act when enacted. By way of background, your letter states as follows:

> With the recent events surrounding the Great Seal of the State not being affixed to an unknown number of legislative acts over the past fifteen years, it has called Into question the legitimacy of such Acts.
>
> Pursuant to South Carolina Constitution, Article III, Section 18. "No Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only".
>
> I personally discovered, with the help of staff at the South Carolina Department of Archives and History on Friday 17th, 2017, that during the legislative years of 2003 and 2004 that 109 legislative acts did not receive the Great Seal of the State affixed to them pursuant to the State Constitutional requirements regarding what is required of a Bill or Resolution to receive the force of law within this State. As you may also know from media reports, that the current Secretary of State, Mark Hammond has admitted within the AP that other Bills and Resolutions within other legislative years under his fifteen year tenure as Secretary didn't receive the Great Seal of the State.
>
> As the magnitude of this failure to affix the Great Seal of the State to legislation over the past fifteen years is not fully known, there are constitutional questions surrounding the legitimacy of these Bills and Resolutions having not received the Great Seal of the State. There are also questions regarding when the Great Seal of the State must be affixed to such Bills and Resolutions. Can such Acts receive the Great Seal of the State within a later legislative session, other than the year it originated,

> since a Bill or Resolution is prohibited from being carried over to the next legislative session?
>
> I raise these questions with your office and request an opinion regarding these matters because as an elected State Representative I took the Oath of Office "that I will, to the best of my ability, discharge the duties thereof, and preserve, protect and defend the Constitution of this State and of the United States."
>
> The essential legal questions for your office to address are (a) what are the Constitutional requirements that a Bill or Joint Resolution must satisfy in order to receive the force of law within our state; (b) whether a Bill or Joint Resolution at the time it is without the Great Seal of the State affixed to it is considered constitutional and/or carry the force of law; (c) Whether there is a time requirement that the Great Seal of the State must be affixed to a Bill or Joint Resolution; (d) can the Great Seal of the State be affixed to a Bill and Joint Resolution that originated within a prior legislative session.

## Law/Analysis

As your letter states, Art. III, § 18 of the South Carolina Constitution (1895 as amended) provides as follows:

> [n]o Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only.

There is no doubt that the provisions of the Constitution, including those contained in Art. III, § 18, are mandatory and must be followed. Art. I, § 23 states the following:

> [t]he provisions of this Constitution shall be taken, deemed and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its owns terms.

Moreover, as our Supreme Court stated in Smith v. Jennings, 67 S.C. 324, 45 S.E. 821, 823 (1903), "[t]here being nothing in the provision under discussion [Art. III, § 16 relating to the style of laws] indicating that it is directory merely, we are bound to hold it as mandatory." However, the Court in Jennings went on to say that "[w]e cannot bring our mind to hold that an absolutely literal compliance with the form prescribed is essential to valid legislation." Thus, "[w]e hold, while the constitutional provision as to form of enacting clause is mandatory, that a substantial compliance with the mandate will be sufficient." 45 S.E. at 824 (emphasis added). The Court cited several South Carolina decisions upholding a "substantial compliance" with a particular constitutional provision. See State v. Robinson, 27 S.C. 618, 4 S.E. 570 (1888); State

v. Hill, 19 S.C. 435 (1883). The Court stated that "[t]hese cases establish the principle that a literal compliance with certain mandatory formulas is not exacted, but that a substantial compliance is sufficient."

With respect to Art. III, § 18, this Office has consistently recognized that the Great Seal of the State requirement contained therein is mandatory and must be obeyed. In S.C. Op. Atty. Gen., 1975 WL 22311 (April 7, 1975), we advised that "it is necessary that the Great Seal of the State be attached before an Act shall become effective." We noted there that

> [t]he provisions of the Constitution are, of course, mandatory and prohibitive unless declared to be otherwise. Article I, Section 23, Constitution of South Carolina. The constitutional provision is essentially the same as that set forth in the Constitution of 1868, and the Journal of the Constitution of 1868 reflects no discussion upon this constitutional requirement, nor was there any discussion by the Constitutional Revision Committee at the time of its formulation of the present constitutional Article I.
>
> Decisions of the Supreme Court of South Carolina upon a constitutional provision in pari materia and relating to the inclusion of the words 'against the peace and dignity of the State' in indictments have construed this provision as mandatory.
>
> It is my opinion that the Great Seal of the State must be attached to a statute before it shall become effective.

(emphasis added).

Likewise, in Op. S.C. Att'y Gen., 1985 WL 259198 (June 27, 1985), we stated:

> [W]e would also mention that Article III, section 18 of the State Constitution, which specifies the formalities which must be followed prior to the effectiveness of an act, has been interpreted by this Office in Opinion No. 4013, dated April 7, 1975, to mean that the Great Seal of the state must be attached to a statute before it shall become effective. We are advised by the office of Secretary of State that the act was reviewed by that office and duly sealed on June 24, 1985. Following this constitutional provision and prior opinions, the act would be deemed effective as of June 24, 1985. However, in this instance, the act was signed by the Governor and sealed on the same date, June 24, 1985. Therefore, the act became effective on that date.

We agree with those opinions, concluding that Art. III, § 18 is mandatory and must be obeyed. As far as we can determine, it has long been the constitutional duty of the Secretary of State to attach the Great Seal of the State to an Act upon its passage. For example, in State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625, 629 (1936), the Supreme Court noted that

> [t]he enrolled bill appears entirely regular upon its face. It was duly signed by the President of the Senate and by the Speaker of the House of Representatives, was duly and regularly passed by the constitutional majority required upon its reconsideration

> when returned to the House and Senate by the Governor with his objections, and filed in the Office of the Secretary of State with the great seal of the state affixed. Having been properly authenticated as required by the Constitution, it becomes the "sole expository of its own contents and the conclusive evidence of its existence and valid enactment" and this court cannot look to the Journals of either House or other extraneous evidence in order to ascertain its history or its provisions, or to inquire into the manner of its enactment.

(emphasis added). And, in State v. Hagood, 13 S.C. 46, 68 (1879), it was noted that

> [t]he act is found among the archives in the Office of Secretary of State with other public acts passed at the last session, signed by the president of the senate and the speaker of the house of representatives, approved and signed by the governor, and having attached the great seal of the state.

(emphasis added). Indeed, as long ago as 1802, in Mounce v. Ingram, 3 S.C.L. 55 (1802), it was observed that "[t]he Secretary of State has custody of the great seal. . . ." Thus, it is today, and long has been the mandatory duty pursuant to Art. III, § 18 for the Secretary of State to affix the Great Seal of the State upon an act of the General Assembly upon receipt of it in his Office. Such duty cannot be avoided or ignored.

We turn now to a brief discussion of a principal purpose of Art. III, § 18 as recognized by our courts. Our Supreme Court has repeatedly emphasized that the requirements of Art. III, § 18 serve for the self-authentication of legislative acts. In Wingfield v. S.C. Tax Comm., 147 S.C. 116, 144 S.E. 846 (1928), the Court discussed this function at some length. There, it was contended, among other objections, that the legislation in question was invalid pursuant to the constitutional requirements of formality in that "it was not read three times in either house. . . ." 144 S.E. at 847. In support of their argument, "petitioners point to the journals of the two houses to substantiate their contention as to irregularities alleged." Id. at 848. However, the Court concluded that the Act could not be so impeached, relying upon the "enrolled bill" rule. The Wingfield Court stated:

> In the case of State ex rel. Hoover v. Chester, 39 S.C. 307, 17 S.E. 752, decided in 1893, the question was again considered. In a unanimous opinion the Court overruled the Platt [2 S.C. 150] and Hagood [supra] cases, and adopted the enrolled bill rule in the following unmistakable language:
>
> > "We announce that the true rule is, that when an act has been duly signed by the presiding officers of the General Assembly, in open session in the Senate-House, approved by the Governor of the State, and duly deposited in the office of Secretary of State, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the General Assembly, and that it is not competent either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an act. And this being so, it follows that the court is not at liberty to inquire into what the journals of the two

> houses may show as to the successive steps which may have been taken in the passage of the original bill."
>
> Reasons for the adoption of the rule become apparent. Public policy, certainty as to what the law is, convenience, and that respect due by the courts to the wisdom and integrity of the Legislature, a coordinate branch of the government, all require that the enrolled bill, when fair upon its face, should be accepted without question by the courts. [citations omitted.]

The Court in Wingfield then proceeded to state that:

> [t]he Chester case, supra, is conclusive of the questions raised by the petitioners in the present case under their first general objection. The enrolled bill appears regular upon its face: It was duly signed by the President of the Senate and the Speaker of the House of Representatives, approved by the Governor, and filed in the Office of the Secretary of State with the great seal affixed. Having been properly authenticated as required by the Constitution, it becomes the "sole expository of its own contents and the conclusive evidence of its existence and valid enactment," and this court cannot look to the journals of either house or to other extrinsic evidence, in order to ascertain its history or its provisions, or to inquire into the manner of its enactment.

144 S.E. at 850 (emphasis added). The "enrolled bill rule" continues to be the law in South Carolina in accordance with Art. III, § 18 of the Constitution. See Med. Soc. of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 278, 553 S.E.2d 352, 356 (1999) ["The enrolled bill rule provides that an Act ratified by the presiding officers of the General Assembly, approved by the Governor and enrolled in the Office of Secretary of State is conclusively presumed to have been properly passed. Such an Act is not subject to impeachment by evidence outside the Act as enrolled to show it was not passed in compliance with law."] (discussing Wingfield and concluding it to be "dispositive in this case."). See also State v. Carr, 5 N.H. 367 (1831) ["The Seal of the State is of itself the highest test of authenticity" and serves without other proof to authenticate a copy of an act to be admitted into evidence].

Your questions pose the converse of cases involving the "enrolled bill rule." You are asking essentially what is the legal effect upon an Act's validity when Art. III, § 18 is not complied with. In this instance, you state that the Secretary of State has failed to affix the Great Seal of the State upon a number of Acts. Our courts have yet to address this question directly.

Of course, as with the potential unconstitutionality of any Act in question, this Office has consistently advised that

> . . . legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("All statutes are presumed constitutional and will, if possible, be construed as to render them valid."). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it

> violates a provision of the Constitution." Joytime Distrib. & Amusement Co. Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, "[W]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Att'y Gen., August 19, 1997.

Op. S.C. Att'y Gen., 2007 WL 4284646 (November 27, 2007). In addition, we have consistently advised that a statute "must continue to be enforced unless set aside by a court or repealed by the General Assembly." Op. S.C. Att'y Gen., 2003 WL 20143494 (April 1, 2003).

Thus, unless and until a court sets aside an act or acts, based upon the absence of the Great Seal of the State not having been affixed thereto, our advice is the same as with any other perceived unconstitutionality – that the Act is presumed valid and should continue to be enforced until a court concludes otherwise. Having said that, however, we will also provide you the benefit of our research in this area as to how a court might rule on the issue.

We have located several decisions in other jurisdictions which have upheld an Act challenged as invalid because there was not strict compliance with a constitutional provision similar to Art. III, § 18. For example, in Taylor v. Wilson, 22 N.W. 119 (Neb. 1885), it was concluded that the failure of the presiding officer of the Senate did not render the Act unconstitutional. The Court cited Cottrell v. State, 1 N.W. 1008 (1879) as follows:

> "The signature of a presiding officer to a bill is a mere certificate to the governor that it has the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides. . . . And where it appears from the journals that a bill has been passed by the requisite majority, and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act, as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same."

Thus, the Taylor Court concluded that "the decision of the district court holding that the act not unconstitutional was correct. . . ." 22 N.W. at 120.

Likewise, the Supreme Court of Kansas, in Commr's of Leavenworth Co. v. Higginbotham, 17 Kan. 62 (1876) concluded that a bond issuance act was valid even though it did not contain the signature of the presiding officer of the senate. It was noted that "the regular president of the senate signed very few of the bills passed at that session" and that some of the bills "were not signed by any presiding officer of the senate." 17 Kan. At 75. The Court's analysis in Higginbotham, upholding the law in question is highly instructive and bears repeating in full. There, the Court concluded:

> The signatures of the presiding officers do not constitute any portion of the law. It is not necessary that the consent of the presiding officers should be had in order to enact the law. The only office that the signatures of the presiding officers is intended to perform, is to furnish evidence of the due passage and validity of the bill. Such

signatures are only portions of the many evidences of the due passage and validity of the bill. And a bill may in some instances, as we think, be valid, although the signatures of one of the presiding officers may be omitted. With one of such signatures gone, the evidence of the passage and validity of the bill would of course be somewhat weakened. If the signatures of both of the presiding officers were gone, the evidence would of course be weaker still. If in addition to this, the journals did not show the passage of the bill, then the evidence of its passage would be almost wholly gone. And taking the whole of the evidence together, if it should not clearly appear to the courts that the bill had been passed by the legislature, and approved by the governor, it would be the duty of the courts to declare that the bill had never become a law. The courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable in such cases. If the enrolled bill were perfect and formal in every particular, then the courts might say that the bill had passed and become a law, although there might be omissions from the journals. (See authorities cited in 15 Kas. 211, and State v. Swift. 10 Nevada, 176.) Or, if the journals were perfect in every particular, and showing that the bill had been regularly and duly passed, then the courts might say that the bill had passed and become a law, although there might be some omissions from the enrolled bill. The enrolled bills and the journals of the legislature are the principal evidences of the passage and validity of a bill, and generally they cannot be contradicted. Probably they can never be contradicted if they are harmonious with themselves and with each other. (Division of Howard Co., 15 Kas. 194.) But in doubtful cases, extrinsic evidence may probably be received to corroborate what they seem to prove, or to explain the doubtful import of their language. We think that the enrolled bill and the legislative journals in the present case, when taken together, clearly show that the bill now under consideration was duly passed by the legislature, and approved by the governor, and that it regularly became a valid law. And all the extrinsic evidence having any application to the case also clearly shows the same thing. Among the evidences (record and extrinsic) which show that said bill has become a valid law are the following: The legislative journals show beyond all doubt that the bill passed the two houses. The senate journal shows that the bill passed the senate. The house journal shows that the secretary of the senate reported to the house, that the bill had passed the senate. The house journal also shows that the bill regularly passed the house, with amendments. The senate journal shows that the senate concurred in the house amendments. The house journal shows that the secretary of the senate reported to the house that the senate had concurred in the house amendments. The senate journal shows that the committee on enrolled bills reported to the senate that the bill had been correctly enrolled, and presented to the governor for his approval. And the senate journal also shows, that the governor reported to the senate that he had approved the bill. The enrolled bill is now preserved in the office of the secretary of state, bound in a book along with the other enrolled bills of that session, and it contains the following evidences of its own passage and validity: It contains the certificate and signature of the secretary of the senate, showing that the bill passed the senate; the certificates and signatures of the speaker and the chief clerk of the house, showing that the bill passed the house, and inferentially that it passed the senate; and the signature and approval of the governor, which inferentially shows that it passed both houses. The bill has been published as a law by the secretary of state,

> both in a newspaper and in the statute book. (Laws of 1865, pp. 41, 42.) It has subsequently been recognized as a law by the legislature and the governor; (Laws of 1866, pp. 72 to 74, 249,250;) and also by the courts; (7 Kas. 479, 576.) And indeed, it has generally been recognized to be as much a law as any other law on the statute book. And the question that it was not duly passed, or signed, has never been raised until recently, although it has been on the statute book for over eleven years. We think the mere failure of the president of the senate to do his duty cannot have the effect to invalidate the law.

Id. at 78-80.

We have located no decisions, even in other jurisdictions, invalidating an Act for lack of a seal of the State being affixed thereto as mandated by Art. III, § 18. But see Ex Parte Coker, 575 So.2d 43, 52 (Ala. 1991) [on rehearing Court concludes its decision that provision requiring deposit in Office of Secretary of State of bill within 10 days of adjournment is mandatory will not be retroactively applied because such application would "drastically upset the administration of justice and unjustifiably interfere with the extensive reliance placed on hundreds of laws for many years."]. However, State v. Toomer, 4 S.C.L. 216 (1854), decided by our own Court, is instructive in this regard. The decision in Toomer is succinctly summarized in Macoy v. Curtis, 14 S.C. 367, 377 (1880) as follows:

> The case of State v. Toomer was strikingly analogous, and, in some respects, stronger than this. Henry R. Laurens was master in equity for Charleston county, and was re-elected in December, 1844. He executed his bond December 3d, which was approved December 24th, 1844, but his commission did not issue until May 7th, 1845, and it was without seal and had endorsed on it only the constitutional oath. The term of office was "for four years and until his successor was elected and qualified." The act of 1840 required a master in equity within three weeks after his election to tender his bond, duly executed, and immediately after it has been approved shall sue out his commission; and upon his neglect or failure to \do so within the said time, his office shall be deemed absolutely vacant, &c. Notwithstanding these stringent provisions and the failure of Mr. Laurens to sue out his commission within the time, his sureties were held liable for a default under the bond of 1844, the court declaring that the statutory provisions prescribing the manner of executing the bond, suing out commission or taking the oath of office, were merely directory. Judge Munro, as the organ of a unanimous court, says: "The only efficacy imparted to the official title of an officer elect by a strict compliance with the directions of the law, such as giving bond, suing out his commission, taking the oath of office, &c., within the prescribed times, is to protect the title against forfeiture. If the state sees proper to excuse his delinquency by granting him a commission, the defects in his title are cured, and if he be already in office his title 'de facto' is immediately converted into a title "'de jure,' having relation back to the time of his election."

(emphasis added).

Another consideration is that many of the Acts which might lack the Great Seal have now been codified into the 1976 Code: Section 2-7-45 declares the 1976 Code of Laws ". . . to be the only general statutory law of the State as of January 1, 1976." Moreover, our Supreme Court has held that in certain instances, codification of an Act serves to "cure" constitutional defects relating to form. See S.C. Tax Comm. v. York Electric Cooperative, 275 S.C. 326, 270 S.E.2d 626 (1980) [unconstitutional act due to "one subject" violation is cured by codification]. See also Pace v. State of Tenn., 566 S.W.2d 861, 864 (Tenn. 1978) [defects in the caption is cured by codification]. Thus, once an act is codified, any formal flaws are rectified.

We turn now to your specific questions.

**(a) What are the Constitutional requirements that a Bill or Joint Resolution must satisfy in order to receive the force of law?**

Each of the requirements set forth in Art. III, § 18, including affixing the Great Seal of the State by the Secretary of State, are mandatory, and cannot be ignored. If one or more of the requirements of Art. III, § 18 are not satisfied, it will be up to a court to determine if the law is, nevertheless, enforceable. Our courts have previously ruled that a statute will be enforceable, notwithstanding failure to comply with each and every formality requirement of enactment if there is "substantial compliance" with such requirement.

**(b) Whether a Bill or Joint Resolution at the time it is without the Great Seal of the State affixed to it is considered constitutional and/or carry the force of law?**

Same answer as (a). This Office has consistently advised that a law is presumed constitutional and remains enforceable until set aside by a court. In our opinion, a court is unlikely to set aside a law which does not have the Great Seal affixed at the time of enactment, particularly if the defect has been cured subsequently. Such would likely be deemed to be "substantial compliance" and would "relate back" to the original enactment. Toomer, supra. Just as the Court stated in Higginbotham that "it is not necessary that the consent of the presiding officers should be had to enact the law," the same holds true for the Secretary of State. As a ministerial officer, he is not given veto power over the enactment of a law in this State. Higginbotham. He should perform his constitutional duty, faithfully, but failure to do so is not likely to imperil an Act's enforceability.

**(c) Whether there is a time requirement that the Great Seal of the State must be affixed to a Bill or Joint Resolution?**

No such time requirement is specified in the Constitution. However, the Framers certainly anticipated that compliance would not only be mandatory, but immediate or within a reasonable time. Late compliance would go to the issue of "substantial compliance," as discussed above.

**(d) Can the Great Seal of the State be affixed to a Bill and Joint Resolution that originated within a prior legislative session?**

The Constitution specifies no time period for compliance, although as noted, it is anticipated that the entire formality process occur immediately upon passage of a Bill or Joint Resolution. The constitutional duty of affixing the Great Seal of the State should be carried out by the Secretary of State immediately upon receipt of an Act. It is our understanding that the Secretary of State's Office files, stamps and enters into a database, an Act upon receipt. Nevertheless, the Constitution requires affixing the Great Seal to the Act and this duty is mandatory. We are aware of no requirement to "cure" the constitutional defect in the same legislative session. Many times, legislation is enacted at the very end of the session and the Governor does not sign the law until after sine die adjournment.

## Conclusion

In other contexts, our Supreme Court has characterized the statutory duties of the Secretary of State as "mandatory and ministerial." Green v. Thornton, 265 S.C. 436, 440, 219 S.E.2d 827, 828 (1975). Here, the duty imposed upon the Secretary of State to affix the Great Seal of the State upon an Act's following presentation to his Office – a duty which the Secretary of State has historically performed – is constitutional in nature. A separate provision of the Constitution, Art. I, § 23 deems all provisions of the Constitution to be mandatory. Thus, most certainly, this duty must be complied with. The Secretary of State's duty is neither discretionary nor directory. See Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009) [Governor failed to fulfill his constitutional duty to execute the law and was subject to mandamus to enforce such duty]. As our Supreme Court recognized in U.S. Rubber Products v. Town of Batesburg, 183 S.C. 49, 190 S.E. 120, 124 (1937), "[t]he Constitution must always be enforced and obeyed...." There is no doubt that Art. III, § 18's requirements for authentication of statutes cannot be ignored.

The issue of the constitutionality and enforceability of an act or acts which do not have the Great Seal of the State affixed thereupon has not been addressed by our courts. But see State v. Bank of S.C., 46 S.C.L. 609, 616 (1860) [construing a similar provision to Art. III, § 18, and noting that upon "ratification" by the President of the Senate and Speaker of the House, the bill "then became a law, and not before."]. However, it has been our longstanding advice that any act of the General Assembly is presumed constitutional and that a statute "must continue to be enforced unless set aside by a court or repealed by the General Assembly." Op. S.C. Att'y Gen., 2003 WL 20143494 (April 1, 2003). That advice is reaffirmed today. All acts which do not or did not have the Great Seal affixed by the Secretary of State in a timely fashion remain valid and enforceable unless and until set aside by a court or repealed by the Legislature.

With respect to the question of how a court might rule as to the validity or enforceability of acts which do not or did not have the Great Seal affixed at the time the acts were enacted, we

believe a court would likely rule that such acts are valid, for several reasons. While the authorities are split, courts in other jurisdictions have upheld acts which lack the signature of a presiding officer upon proof through other evidence that the act was validly passed. See 95 A.L.R. 278 "Effect of failure of officers of legislature to sign bill as required by constitutional provisions." (discussing cases invalidating, as well as upholding, statutes where there is noncompliance by the presiding officer as required by provisions similar to Art. III, § 18). Moreover, in Toomer, our own Supreme Court upheld the appointment of an officer whose commission lacked the Great Seal of the State as required by law, noting that upon curing the defect, the validity of the officer's appointment "relat[ed] back to the time of his" appointment. We believe Toomer's analysis is sound and would be followed by a court here.

Further, our courts have also concluded that "substantial compliance" is sufficient with respect to a defect in compliance with the constitutional formalities of an act. While we believe the Secretary of State has a constitutional obligation to affix the State Seal to an act immediately upon receipt, the fact that no time period is specified in the Constitution would seemingly allow him to "cure" the defect. Such cure would constitute "substantial compliance" with the constitutional requirements. In our view, this curing would "relate back" to the time of enactment. Toomer, supra. Moreover, the fact that many of the laws in question have now been codified, may well serve to "cure" the constitutional defect.

In addition, the failure of the Secretary of State's Office to follow the mandates of Art. III, § 18, resulting in the invalidity of laws validly enacted by the General Assembly, would give the Secretary of State a "veto" power over an Act not even possessed by the Governor under the Constitution, whose veto may be overridden. As the Court in Higginbotham correctly stated, the omission by the presiding officer to affix his signature in order to ratify an act (as also required by Art. III, § 18) cannot invalidate the act because "consent" by the presiding officer is "not necessary ... to enact the law." Likewise, the Secretary of State is not empowered to "veto" a law's enforceability.

We note also that the Supreme Court of Alabama in Coker addressed a constitutional provision requiring that a bill presented to the governor within five days of adjournment of the Legislature be deposited with the Secretary of State within 10 days of adjournment. The Court concluded that failure to comply rendered the Act in question unconstitutional; however, the Court, in overruling its prior decision concluding the constitutional provision was directory only, made its ruling prospective. The Court found that a retroactive effect of unconstitutionality "would drastically upset the administration of justice and unjustifiably interfere with the extensive reliance placed on hundreds of laws for many years." 575 So.2d at 53. Thus, even were a court to conclude that the failure of the Secretary of State's Office to affix the Great Seal of the State to various acts invalidated those Acts, it could make its decision prospective only thereby leaving all acts prior to the ruling as valid. See Russo v. Sutton, 310 S.C. 200, 205, 422 S.E.2d 750, 754 (1992) ["Because our decision to abolish the tort of alienation of affections is given prospective application, the order of the trial judge is affirmed."].

In concluding that a court is likely to uphold validly enacted laws upon one of the legal grounds set forth above, notwithstanding the failure to affix the Great Seal, we certainly do not minimize the importance of this constitutional requirement. As discussed above, the purpose of these formalities of an Act (e.g. signatures of presiding officers), including affixing the Great Seal thereupon by the Secretary of State, is to authenticate a law without the need to prove through extrinsic evidence that it was properly enacted. We emphasize again that these constitutional obligations must be followed. However, laws properly enacted by members of the General Assembly, who are elected by the people, (and signed by the Statewide-elected Governor, or his veto overridden), are a vital part of the Constitution as well. As our Supreme Court held in State ex rel. McLeod v. Court of Probate of Colleton Co., 266 S.C. 279, 301-02, 223 S.E.2d 166, 178 (1975), where so many acts were there concluded to be unconstitutional, "[e]ndless confusion and expense would ensue if the members of society were required to determine at their peril" the rights and liabilities resulting from unconstitutional acts. So too here.

Thus, while we emphasize that the Secretary of State's mandatory constitutional duty is to affix the State Seal upon each and every act upon presentation to his Office, we also believe that a court will give effect to and uphold the acts in question, particularly if satisfied that the Secretary of State has appropriately cured these omissions.

Sincerely,

Robert D. Cook
Solicitor General