September 5, 2007

The Honorable Larry A. Martin
Member, South Carolina Senate
Post Office Box 247
Pickens, South Carolina 29671

Dear Senator Martin:

We received your letter requesting reconsideration of an opinion issued to B.R. Skelton on July 6, 2007. In that opinion, we responded to four questions raised by Ms. Hay, a constituent of Representative Skelton. You are particularly concerned with our response to the second question concerning the use of weighted voting by the Senate in passing the House Bill 3782. You state as follows:

> Representative Skelton's second question stated, in part, that "we cannot find anywhere in the SC Code of Laws or the SC Constitution an explanation for the use of a weighted vote in the Legislature." I respectfully invite your office's attention to Article III, SECTION 12 of the South Carolina Constitution that was not referenced in the July 6th opinion. This section provides: Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and with concurrence of two-thirds, expel a member, but not a second time for the same cause. It is my view that this absolute grant of authority to determine its rules of procedure satisfactorily responds to Representative Skelton's second question in connection with the Senate consideration of House Bill 3782.
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> Senate Rule 51 was adopted at the beginning of the Senate session in January, 2005 . . . . The rule was designed to facilitate the consideration of local legislation, such as HB 3782, when senators that represent portions of a county do not agree. In some instances, a county is represented by multiple senators but none of the senators are resident senators. Thus, the Senate chose to act on local matters such as HB 3782 pursuant to the provisions of Rule 51, which is in keeping with Article III, section 12.

> Lastly, I respectfully invite you to review a salient excerpt from the Senate Journal, dated May 31, 2007 . . . The matter in question is the amendment or Senator Alexander's motion to amend HB 3782. That amendment failed on a one to one vote regardless of the application of Rule 51. Further, once the amendment failed, the bill was adopted by the Senate and the journal does not reflect a weighted vote. Therefore, contrary to the assumption contained in the opinion of July 6th, the bill was properly considered by the state Senate, and unanimous consent was granted by the entire Senate for Third Reading on Friday, June 1st, during the Senate's local session day.

Thus, taking into account the above information, you request that we reconsider our response to the second question addressed in our opinion to Representative Skelton.

Law/Analysis

We begin by acknowledging that we were unaware of the existence of Rule 51 in addressing the second question contained in Representative Skelton's request. Thus, we will again consider this question taking into account Rule 51. As included with a copy of your request, Rule 51 states as follows:

> The Clerk of the Senate shall prepare a list for each county of the State the percentage of the population of that county that a Senator represents. For general bills with local application, a Senator's vote shall be weighted based upon the percentage of the population of the county that the Senator represents.

As you pointed out in your letter, article III, section 12 of the South Carolina Constitution (1976) allows each house the authority to "determine its rules of procedure . . . ." By this provision,

> [t]he Constitution empowers each House to determine its rules and proceedings. Neither House may by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of procedure established by the rule and the result which is sought to be obtained, but within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, and even more just.

State ex rel. Coleman v. Lewis, 181 S.C. 10, 22, 186 S.E. 625, 630 (1936). Accordingly, so long as the rule does not run afoul the Constitution, the Legislature may adopt such a rule.

Whether or not Rule 51, by containing a provision for weighted voting, runs afoul of a provision of the Constitution is a question that may not be properly addressed by this Office. First and foremost, this Office is without jurisdiction to declare a statute or any rule of law unconstitutional. Ops. S.C. Atty. Gen., February 22, 2007; October 27, 2006; December 13, 2005. Moreover, article I, section 8 of the Sought Carolina Constitution (1976) mandates a separation of powers between the three branches of State government. Based on this provision, our Supreme Court indicated that no other branch of government may adjudicate questions concerning the operations or procedures of either the House or the Senate. Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 (1940). Thus, this Office is constitutionally prohibited from commenting on the validity of a rule adopted by the Senate. See, Ops. S.C. Atty. Gen., May 16, 1991; November 15, 1976). Additionally, our courts take the position that they will not impinge upon the Legislature's ability to exercise its powers unless an act of the Legislature "in violation of the Constitution, deprives a person of life, liberty or property without due process of law, or which impairs the obligation of a contract, or which otherwise infringes the rights of citizens and taxpayers through unlawful diversion of public funds or by impairment of the rights of the individual . . . ." Culbertson, 194 S.C. at 111-12, 9 S.E.2d at 220. Whether Rule 51 falls within those instances listed above, is a decision that only a court may properly address. Thus, unless and until a court rules otherwise, Rule 51 stands as a valid exercise of the Senate's authority to determine its own rules pursuant to article III, section 12.

In addition to alerting us to the existence of Rule 51, in your letter and through conversations with our Office, you point out that the Senate ultimately adopted House Bill 3782 by unanimous consent. You provided a copy of the Senate Journal dated May 31, 2007 reflecting the votes on House Bill 3782. The journal excerpt indicates a weighted voted after the first reading. However, it does not indicate weighted voting after the second or third reading. According to our conversations with you and the legislative history of the bill, it was put before the full Senate and after the third reading, the Senate adopted the bill by unanimous consent. Thus, weighted voting was not used in the ultimate passage of this legislation. Therefore, regardless of whether the Senate may employ weighted voted on local matter, its was not used in the enactment of House Bill 3782.

Furthermore, we do not believe a court would find the use of weighted voting after the first reading impairs the validity of House Bill 3782. Our courts have held "when an act has been enrolled, signed by the President of the Senate and the Speaker of the House, its terms can be ascertained only by an inspection of the enrolled act, and evidence from the Journal of the House and of the Senate is not competent for this purpose. The court conclusively presumes that the act has been properly passed." State ex rel. Coleman, 181 S.C. at 18-19, 186 S.E. at 629. The legislative history of House Bill 3782 indicates the bill was enrolled, ratified, and signed into law by the Governor. Thus, meeting all the requirements of the enrolled bill rule set forth above, we believe a court would presume the Legislature properly passed House Bill 3782. Accordingly, we do not

believe a court would find the Senate's use of weighted voting after the first reading impairs the validity of the legislation.

Conclusion

Although article III, section the South Carolina Constitution affords broad authority to both the House and the Senate in the adoption of their own rules and procedures, this authority is not unlimited. The rules promulgated by these bodies must comply with any restraints imposed by other provisions of the Constitution. However, in accordance with the doctrine of separation of powers, and given this Office's inability to make determinations as to the constitutionality of a rule or law, we are without the authority or jurisdiction to make a determination as to whether the Senate's rule requiring the use of weighted voting on local matters is constitutional. Nonetheless, regardless of any constitutional arguments regarding the validity of weighted voting in these circumstances, we understand that the Senate ultimately passed House Bill 3782 on the basis of unanimous consent. Moreover, considering the enrolled bill rule, we believe a court would not look beyond the act, which appears to have been properly enacted.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General