ALAN WILSON
ATTORNEY GENERAL

March 12, 2014

The Honorable Larry A. Martin
Senator, District No. 2
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

You have requested an opinion "on an issue that could impact the ability of the State of South Carolina to hold elections during the current election cycle." By way of background, you state the following:

> As you are aware, in August 2013 Judge Thomas Cooper issued the opinion in *SC Public Interest Foundation v. Courson, Jackson et al.* In that case, Judge Cooper found that Act 17 of 2011 that merged the Richland County Election Commission and the Richland County Board of Registration into one body violated the South Carolina Constitution's prohibitions against special legislation and single county legislation.
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> In making his ruling, Judge Cooper discussed an opinion issued by the Attorney General in response to a request by Senator McConnell in which the Attorney General warned that Charleston County's law combining its county board of voter registration and its could election commission was constitutionally suspect. At least in part because of that warning, the General Assembly enacted Act 312 of 2008. Act 312 addressed all forty-six counties in South Carolina, but did not change the substance of the individual counties local and special acts. Judge Cooper opined that he believed it was the intent of the General Assembly to use a single-wide bill to correct the defects of the myriad local acts relating to county election commissions and county boards of registrations.
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> Judge Cooper referred to Act 312 as general legislation that governed county boards of registration. It seems that Richland County's constitutional fault lied in changing the manner of governance contained in Act 312 by means of special and single county legislation in 2011. In 2011, the General Assembly passed Act 17 which only dealt with the governance of Richland County's boards of elections and voter registration.

The issue that confronts us now and that was only briefly discussed in Judge Cooper's ruling is whether Act 312 is itself constitutional. Judge Cooper described Act 312 as general legislation but the issue of the constitutionality of Act 312 was not at issue. As you are aware, Article III § 34(IX) "prohibits the enactment of a general law where a general law may be applicable." My question is whether Act 312 that codifies disparate treatment in separate counties is special legislation since it could be argued that statewide similar treatment of election and voter registration boards is possible especially if there are no unique circumstances that justify the county by county distinctions provided in the Act.

Based on the ruling of Judge Cooper, I am asking whether Act 312 would be considered special legislation because its county by county approach to election and voter registration boards could have been made uniform through a standard state-wide governance model. Or would Act 312 be considered a legitimate general law as described by Judge Cooper and the only ongoing constitutional issue would be varying from the governance framework created therein by special legislation as was done by Richland County.

As you may be aware, S. 866 is pending before the South Carolina Senate that would create a statewide uniform governance model. It is likely that the constitutionality of Act 312 will be a major issue in the debate on S. 866 and since it is imperative that there be no clouds that might impact the state's ability to administer its elections in 2014, I would appreciate your response as soon as possible.

Law/Analysis

In an opinion, dated November 26, 2012 (2012 WL 606182), we discussed the history of Act 312 of 2008, now codified at S.C. Code Ann. Section 7-27-10 *et seq*. There, we explained that

> [i]n 2008, pursuant to Act No. 312, the General Assembly enacted legislation codifying the various local laws which had combined county election commissions and board[s] of voter registration. Such provisions are found at § 7-27-10 *et seq*. Section 7-27-120 states that the purpose of Act No. 312 is that "[b]y codifying the provisions for county boards of registration and election commissions, the General Assembly intends to provide greater public access to the statutory provisions for registering voters and coordinating elections in this State." Section 7-27-110 provides that "[t]hose counties that do not have combined boards of registration and election commissions must have their

> members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70."

In that same opinion, we expressly declined to comment upon the constitutionality of Act No. 312 as a law for a specific county under Art. VIII, § 7 of the South Carolina Constitution. We observed that we had previously concluded that individual local laws combining county boards of election and boards of voter registration were likely unconstitutional, see *Op. S.C. Atty. Gen.*, August 14, 2007 (2007 WL 3244880) but that "[w]hether the codification of all local laws relating to the structure and authority of the Boards of Election and Voter Registration would make any constitutional difference under Art. VIII is beyond the scope of this opinion and is for the courts to decide." That is the question you now pose to us.

Of course, in any effort to question the constitutionality of Act No. 312, such Act is entitled to the presumption of constitutionality. As we stated in the 2007 opinion, referenced above,

> ... we must bear in mind that "[s]tatutes are presumed to be constitutional and will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt." *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Moreover, only a court, not this Office, may declare legislation unconstitutional. *Op. S.C. Atty. Gen.*, June 22, 2007. Thus, regardless of our findings with regard to the constitutionality of these legislative acts, they remain valid and enforceable unless and until a court rules otherwise.

We also note that, pursuant to Art. II, § 10 of the Constitution, the General Assembly

> ... shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.

As referenced above, in our 2007 opinion, we concluded that an individual act merging the Charleston County Election Commission and the Charleston County Board of Voter Registration was likely unconstitutional as violative of Art. VIII, § 7. We found that

> [i]n an opinion of this office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of voter registration and county election commissions on a county-by-county basis. *Op. S.C. Atty. Gen.*, January 5, 1977. We concluded "such legislation would most probably be violative of that portion of Article VIII, section 7 of the South

> Carolina Constitution of [1895] ..., as amended, which proscribes laws for a specific county." *Id.* Following this opinion and the principles espoused by the Court in [particular cases], we believe a court would likely find this piece of legislation violative of article VIII.

Furthermore, as you state, Judge Cooper, in his unappealed from Order of August 26, 2013, concluded that Act 17 of 2011, combining the Richland County Board of Voter Registration and Election, violated both Art. III, § 34 and Article VIII, § 7 of the South Carolina Constitution. He reasoned that such Act "constitutes an unconstitutional local or special law, where a general law was *already* applicable. It creates a special exception for Richland County, and it thereby violates S.C. Constitution Article III, § 34." Judge Cooper added the following:

> South Carolina recognizes a limited exception to Article III, § 34 when the legislation furthers the purpose of Home Rule by devolving the power away from the legislature to a county. However, Act 17 of 2011 does not qualify for this exception. It imposes the General Assembly and its members into the governance of the County elections contrary to the letter and spirit of Home Rule. Furthermore, when the power is to be devolved from the legislature to the county, it should be devolved statewide and not on a county-by-county piecemeal basis. *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). Act 17 of 2011 contravenes Home Rule and is unconstitutional.

Given these authorities regarding the unconstitutionality of individual Acts merging the Boards of Voter Registration and Elections, we do not believe it makes a constitutional difference with this collection of unconstitutional local laws in the form of Act No. 312. Our Supreme Court addressed this very issue long ago in *Gamble v. Clarendon County,* 188 S.C. 250, 198 S.E.2d 857, 864 (1938). There, the Sheriff of Clarendon County sought to recover certain fees and costs pursuant to a statute relating to Clarendon County only which was enacted in 1931 (37 State. at Large 212). Our Supreme Court, nevertheless, found that this codified Act was special legislation. The Court concluded as follows:

> [c]omplaint is also made that the Circuit Judge erred in sustaining the demurrer to the ninth defense for the reason that the act of 1931 (37 Stat. at Large 212) was adopted in the Code of 1932 as a part of the general statutory law of the State. The Court is not in accord with this view. We do not think it may soundly be held that section 5 of article 6 of the Constitution, in providing for the codification of the general statutes, has the effect of curing all possible violations of section 34 of article 3 of the Constitution, by the expedient of passing an act declaring the statutes embodied in the Code to be the general statutory law of the State. Furthermore, it is not made to appear that the constitutional authority given to the

> Legislature for the codification of the general statutes was intended to include the power to collect for such purpose unconstitutional special legislation, whether original or amendatory, and by such act give to it the force and effect of a valid statute.

198 S.E. at 864.

Although in his Order, Judge Cooper used the term "general law" in referring to Act No. 312, now codified at §7-27-10 *et seq.*, we do not believe he intended to hold that the Act was constitutional. We believe Judge Cooper was simply saying that Act No. 312 is general in form. Our Supreme Court has recognized repeatedly that "[a] law that is general in form but special in its operation violates the constitutional prohibitions against special legislation." *Kizer v. Clark*, 360 S.C. 86, 93, 600 S.E.2d 529, 532 (2004). And, as Judge Cooper concluded, "power … devolved from the legislature to the county … should be devolved statewide and not on a county-by-county basis." *Order* at 10. In *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996), the Court declared invalid under Art. III, § 34 and Art. VIII, a statute which allowed individual counties to "opt out" of a statewide criminal law such that the law would "criminalize in twelve counties conduct that is legal under state criminal law." 324 S.C. at 188, 478 S.E.2d at 275.

As in *Martin* – even more so – Act No. 312 is simply an amalgam of laws, each for a particular county. While the Act addresses all 46 counties, just as in *Martin*, the effect is a different result in each county. Certain counties have combined the boards of election and voter registration; yet, the Act expressly recognizes others do not. Even those counties which do have combined boards have different structures, compositions, etc., depending upon the individual county. Thus, while the Act may appear general, it is far from uniform, but is instead a collective hodgepodge of local laws.

Conclusion

Based upon the foregoing, we believe a court would likely conclude that Act No. 312 unconstitutionally violates Art. III, § 34 and Art. VIII, § 7 of the South Carolina Constitution.

Sincerely,

Robert D. Cook
Solicitor General

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