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1323 Pendleton Street
Columbia, South Carolina 29201
P 803 779 5022
F 803 779 4953
scpolicycouncil.com

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Constitutionality of Roll Call Voting Requirement

John Simpkins, J.D.

This memorandum addresses, specifically, whether S.C. House Bill H. 3047 (hereinafter “H 3047”) is constitutional and, more generally, whether the changes to the method of recording votes in both houses of the South Carolina General Assembly are constitutional.

H 3047 would “require certain bills and joint resolutions to receive a recorded roll call vote at various stages of their passage by the House of Representatives and the Senate.” The requirements of H 3047 would require a recordation of “yea” and “nay” votes by name and would override the traditional practice in the General Assembly of allowing *viva voce* votes on certain matters. The primary source of concern regarding the constitutionality of H 3047 is Section 12 of Article III of the South Carolina Constitution, which reads:

Each house shall choose its own officers, *determine its rules of procedure*, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause. [emphasis added]

If H 3047 is deemed to alter the rules of procedure for either house of the General Assembly, it could be considered an unconstitutional contravention of the right accorded to each house in Article III, Section 12 to establish its own procedural rules. While the arguments are set out in greater detail below, the initial conclusion is that part of the likelihood for success of H 3047 depends on whether it is characterized as being procedural or substantive in intent. The additional factor is whether, even if it is conceded that the bill seeks to alter the procedure in the House and Senate, the issues it addresses rise to a level of importance that should be addressed through a means other than standard provisions for procedural rule-making in each house.

ARGUMENTS

There are two arguments to be advanced in favor of the constitutionality of H 3047. One concerns the substantive, rather than procedural, consequences of the proposed legislation. The second relates to the inability of either house of the General Assembly to violate fundamental rights through its rules of procedure.

As to the first argument, H 3047 seeks to do more than simply alter the manner in which each house conducts its business. The aim of H 3047 reaches beyond organizational matters to the very heart of republican government. The bill intends to foster greater transparency in democratic governance by allowing voters to see how their elected representatives vote.

The plain language of Section 12 of Article III relates specifically to “rules of procedure” in each house. The substantive orientation of H 3047 places the bill beyond the scope of the constitutional grant of authority to each house of the General Assembly to determine its own procedural rules. For this reason, H 3047 should comply with the South Carolina Constitution.

The second argument in favor of the constitutionality of H 3047 advances an alternative view that, even if the bill is considered to be procedural in nature, it nevertheless advances a fundamental right which cannot be defeated by the rules regime of either house. The SC Supreme Court addressed the

constitutional authority of each house to determine its own rules of procedure in *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936). The Court observed:

The 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. 186 S.E. 625, 634.

The court in *Coleman* thus articulates a requirement that, even in the formulation of its procedural rules, both houses are required to respect fundamental rights as well as the constitutional framework. Moreover, each house is required to reasonably tailor the rule of procedure to the goal the rule seeks to achieve. Using the framework in *Coleman*, it can be argued that the current house rules permitting *viva voce* votes on the matters addressed in H 3047 deprive citizens of their fundamental right to representative government by denying them an opportunity to know how their elected representatives have voted.

This argument alone may not withstand a constitutional challenge. Simply arguing that the current voting procedures are unjust is not necessarily a sufficient rationale for changing the voting procedures. There are additional arguments, however, that merit consideration.

Assuming H 3047 does seek to effect a procedural change in either the House or the Senate, there is an additional point to be raised. Part of the Senate's resistance to the legislation stems from a view that the Senate and the House have sole authority to determine their procedural arrangements. Implicit in this view is that the Constitution and any statutes are meant only to address substantive structural issues (*i.e.* organization of government) or to provide for laws of general applicability.

This distinction between substantive and procedural rules breaks down, however, upon further examination of the provisions of Article III. The Article, which sets out the structure of the Legislative Department, contains numerous Sections that touch on the procedural as well as substantive operation of each house. Nearly one-third of the 34 Sections contained in Article III touch on some manner of procedural operations in each house. [A list of the relevant Sections is included as a separate attachment in the transmission of this memorandum.] For example, Section 9 addresses the circumstances in which each house may enter into recess. Section 10 defines what constitutes a quorum in each house. Sections 16 and 18 respectively concern the style of each law and the number of readings required for passage. More importantly, Sections 20 and 22 specifically address voting arrangements. Section 20 permits the use of voice votes in all elections. Section 22 outlines the requirements for recording votes. Clearly, what has been stipulated in the Constitution may be changed by further amendment of the Constitution.

In addition, there are statutory provisions addressing clearly more procedural concerns than those contemplated in H 3047. For example, Title 2 of the South Carolina Code, addresses legislative procedural matters such as adjournment (2-1-180) and orientation programs for new members (2-1-215).

The General Assembly enjoys a broad scope of authority in exercising its constitutional powers. This grant of authority has been characterized by an extreme degree of judicial deference to the legislative branch in the pursuit of legislative prerogatives. In *Culbertson v. Blatt*, the S.C. Supreme Court observed, "[I]t is not within the power of this court to impinge upon the exercise by the Legislature of a power vested in that body, merely because in the exercise of or failure to exercise that power, some constitutional provision has been violated." 194 S.C. 105, 9 S.E.2d 218, 220 (1940).

This ruling could be interpreted two ways: Either that the Court would defer to the Legislature in broadly governing itself, thus upholding its current rules, or that the Court would be highly unlikely to question the Legislature should it choose to pass a law that governs its voting process. Given that the challenge is most likely to come from the new law's passage rather than the exercise of the current system, it is reasonable to assume the Court would defer to the Legislature's right to pass a law requiring itself to record its votes. Analyzing the constitutional question purely from the historical practice of the Court would suggest a limited chance of success were the issue of H 3047's constitutionality to be litigated.

CONCLUSION

There is a compelling argument to be made that the goal sought by H 3047 is more substantive than procedural. While the Legislature may craft procedural rules for its daily operations, those rules may not infringe upon fundamental rights. H 3047 is arguably a law that would have an impact on the direct relationship between citizens and their elected representatives, not simply a rule governing how the Legislature is organized or conducts its daily business. However, even if the proposed legislation is considered to be procedural in nature, the plain language of the South Carolina Constitution demonstrates that the houses of the General Assembly do not have the exclusive authority to determine their procedural arrangements. The provisions of Article III as well as sections of Title 2 indicate clear history of constitutional and statutory articulation of procedural arrangements for the two houses. Combined with the wide constitutional latitude historically given to the legislature, those arguments suggest it is unlikely H 3047 would be deemed unconstitutional.

John L. S. Simpkins is Assistant Professor of Law and Director of Diversity Initiatives at the Charleston School of Law where he teaches constitutional law. He also is Of Counsel with the law firm of Wyche Burgess Freeman and Parham, in Greenville, SC. Prof. Simpkins received an A.B. in Government from Harvard College and a J.D. and LL.M. in International and Comparative Law from Duke University School of Law. He is a Fellow of the American Bar Foundation.

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