

# RESTRUCTURING

**“Governor Sanford keeps implying there are three co-equal branches of government. They are not co-equal in South Carolina.”**

**— Columbia attorney Dick Harpootlian**

If it was not clear previously, the conclusion to this year’s budget impasse decisively illustrated that the legislative branch in South Carolina controls virtually all of state government — and thus holds complete responsibility for the state’s hoped-for economic recovery and future political fortunes. The General Assembly’s power monopoly is not so much a function of personalities or conflicts between the legislature and the governor as it is a result of the peculiar structure of South Carolina’s government. In brief, the state constitution — buttressed by legal precedent — encourages the consolidation of legislative power — over legislative, executive and judicial functions. Thus while some statutory reforms are possible, the only sure way to restructure the government is to amend the constitution.

There are essentially two ways of bringing about constitutional restructuring. The first would be by electing a popular and savvy reform-minded governor capable of going over the heads of the legislature by appealing to the people. Governor Sanford, no doubt, intended to accomplish such reforms but was unable to gain support for his initiatives in the legislature. This fact indicates that change is more likely to be incremental and to come from the election of legislators committed to restructuring. In either case, a grassroots movement focused on restructuring is urgently needed in South Carolina. In the end, only such a movement is likely to convince elected officials that their re-election depends upon restructuring state government.



*The Battle of Camden during the American Revolution helped make a reality the Founders' vision of limited government and a system of checks and balances that prevents one branch from dominating the other.*

Carolina.

## Amending the S.C. Constitution

Legislators introduced 61 pieces of legislation during the 2009 session that would have initiated the process of amending the state constitution. These include: 58 joint resolutions and 3 general bills. Only 1 joint resolution passed: H 3483, which affirms the right to hunt, fish and harvest wildlife.

In order to become law, a constitutional amendment must be approved by a two-thirds vote in each chamber of the General Assembly; then approved by a majority of voters; and then after the election ratified by a majority vote in each chamber. Another bill, S 80, would also have created a referendum process to amend the constitution.

By restructuring we mean a more balanced distribution of power between the legislative, executive and judicial branches of state government. As is well known, the Founders of our country argued that “the separate and distinct exercise of the different powers of government” is

essential to “the preservation of liberty.” This was because the Founders recognized, from personal experience with the British Parliament, that no one branch is immune to the abuse of power. Simply put, restructuring is the key to reducing corruption, increasing transparency and making government better in South

## BEST IDEAS OF 2009

✓ **Reducing the number of constitutionally elected offices**

**H 3231: Joint Election of Governor and Lt. Governor**

*Status: Passed the House; referred to Judiciary Committee in the Senate*

This joint resolution proposes amending the state constitution so as to permit the joint election of the governor and lieutenant governor beginning in 2014. Currently, 25 states follow this practice while 8 others have a joint nomination process. Also see S 162, S 203, H 3379

**H 3279: Governor Appoints Sec. of State**

*Status: Voted favorably out of House Judiciary Committee; debate adjourned on House floor*

This joint resolution proposes amending the state constitution so as to permit the governor to appoint the Secretary of State. Also see S 158

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### **H 3280: Governor Appoints Sec. of Education**

*Status: Voted favorably out of Judiciary Committee; debate adjourned on House floor*

This joint resolution proposes amending the state constitution so as to permit the governor to appoint the Secretary of Education. Also see S 164

### **What do you think?**

Let us know what you think are the best and worst bills of the session. Call us at 803-779-5022 or visit us on the web at: <http://www.scpolicycouncil.com/contact>

### **H 3277: Governor Appoints State Treasurer**

*Status: Referred to Judiciary Committee*

This joint resolution proposes amending the state constitution so as to permit the governor to appoint the State Treasurer.

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### **H 3614: Governor-appointed Offices**

*Status: Referred to Judiciary Committee*

Sponsored by House Speaker Bobby Harrell (R-Charleston), this joint resolution proposes amending the constitution to permit the governor to appoint the Adjutant General, Commissioner of Agriculture, Secretary of State, and Superintendent of Education. A related bill, H 3145, added the Comptroller General to this list. Also see S 129, S 160, S 161, S 163, S 165, H 3275, H 3276, H 3278

► **Our take:** Legislators introduced numerous bills that would have permitted the governor to appoint, with the advice and consent of the General Assembly, most of South Carolina's eight constitutional, execu-

### **H 3147: S.C. Restructuring Act**

This legislation would create a Department of Administration as an executive-level agency headed by a governor-appointed director. The new department would take over certain responsibilities from the Budget & Control Board and other entities. The bill also would create the office of State Inspector General charged with investigating complaints regarding improper or unlawful activity within executive agencies. At the same time, H 3147 would expand legislative power by providing for the creation of standing committees charged with conducting investigations over all agencies at least once every five years. The legislation passed the House and was referred to the Judiciary Committee in the Senate. Also see S 128, S 208

tive-level offices. Currently, these positions are elected, which means each officeholder essentially functions as an independent agent, and may choose to further the governor’s agenda or not. The result is that gubernatorial authority is weakened even as people expect the governor to effectively manage these areas of state government. In the end, the result is a loss of transparency and accountability. Of the bills listed above, only

one passed one chamber; two others passed through committee but debate was adjourned on the floor. These bills are thus still on the contested calendar.

**“In the *Federalist Papers*, James Madison said: ‘The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’ And that’s precisely what we have in South Carolina — a tyranny by the legislature. As John Stuart Mill noted in one of his early essays, ‘Parliament can act as a tyrant just as much as a King can.’”**

**— Senator Tom Davis (R-Beaufort)**

### ✓ Streamlining agencies and eliminating duplication

H 3199: Department of Behavioral Health Services

*Status: Passed the House; referred to Medical Affairs Committee in the Senate*

This bill would consolidate the Department of Alcohol & Other Drug Abuse Services with the Department of Mental Health to create a new Department of Behavioral Health Services.

H 3314: Director of Department of Disabilities & Special Needs

*Status: Passed the House; referred to Medical Affairs Committee in the Senate*

This bill would give the governor authority to appoint a director of the Department, which is currently administered by the S.C. Commission on Disabilities and Special Needs.

H 3442: Department of Workforce

*Status: Recommitted to Judiciary Committee after receiving a favorable committee report (with amendment)*

This bill would create an executive agency, the Department of Workforce,

that would replace the Employment Security Commission. The Commission currently operates under the oversight of a legislative panel comprising three ex-legislators. Although this bill had significant support at the beginning of session, *The State* reported that some legislators voted against this reform to spite the governor. The General Assembly, however, did sustain the governor's veto of a budget proviso (67.1) that essentially permitted Employment Security commissioners to set their own pay without approval from the General Assembly.

### **H 3128: Director of Ports Authority**

*Status: Referred to Judiciary Committee*

This bill would have dissolved the 9-member board of the Ports Authority and made the Authority an agency run by a governor-appointed director. Instead, the legislature chose to consolidate the board's power even more (see below).

► **Our take:** These proposed reforms are essentially of two types: 1) giving the governor authority over agencies currently run by largely anonymous boards and commissions; 2) consolidating agencies that perform related functions. The single best reform the state could undertake in this area, however, would be to dissolve the Budget & Control Board (cf. H 3147).

### **S 209: Shorten General Assembly Session**

*Status: Referred to Judiciary Committee*

This proposed amendment would require each annual session to adjourn on March 31. Currently, there is no constitutionally mandated adjournment date, but state law requires the General Assembly to end before the first Thursday of June. Also see H 3127, H 3405, H 3417

► **Our take:** Streamlining state government could begin with the General Assembly shortening the annual session. In 2009, the



South Carolina's state-run Ports Authority expects shipping traffic to decline 20 percent this year as traffic leaves the state for more efficient private sector alternatives.



### **More good bills that didn't pass:**

**S 66:** Permits the governor to remove the directors of the S.C. Public Service Authority (Santee Cooper) board.

**H 3197/S 384:** Dissolves the Department of Health & Environmental Control Board and replaces it with a governor-appointed director charged with managing the agency.



*The consolidation of power in one branch of government increases the likelihood of mismanagement and corruption.*

## **X** More bad bills that didn't pass:

**H 3498:** Expands General Assembly's power over executive agencies and sets terms for conducting investigations over all agencies at least once every five years.

House took a five-week furlough while the Senate took a three-week break (with both chambers leaving Columbia early). Guess what? No one noticed. Shortening session would force legislators to focus on passing substantial legislation and prioritizing state spending, instead of wasting time funding new pork projects, worrying about school snow days and bickering with the governor.

## **WORST IDEAS OF 2009**

### **X** Co-opting executive appointments and agencies

#### **S 351: Ports Authority Reorganization**

*Status: Governor's veto overridden*

This legislation prohibits Ports Authority board members from being removed by the governor at will. The governor retains the power to appoint board members, with the consent of the Senate; members serve for five-year terms. The law also requires the Authority to maintain an online transaction register.

#### **H 3560 (proviso 89.137): S.C. Research Authority**

*Status: Governor's veto of proviso sustained by the House*

This proviso removed the governor's authority to appoint the chairman of the S.C. Research Authority.

#### **S 339: Transportation Secretary**

*Status: Referred to Transportation Committee*

Currently the Transportation Secretary is appointed by the governor and serves at his pleasure. This bill would give the legislature the power to screen and nominate candidates that could only be removed for cause.

► **Our take:** According to the Founders, the doctrine of separation of powers requires the members of one branch of government have as little authority as possible over appointments to another branch. This principle not only failed to gain ground this session, but took a step backward with the General Assembly taking over the Ports Authority from the governor.

## Judicial Restructuring

South Carolina is the only state in the country in which the legislative branch possesses exclusive control over judicial appointments. (Virginia’s legislature also appoints judges, but the governor may fill unexpired terms.) In practice, this means the judicial branch is subordinate to the legislature. In an attempt to counteract this impression, the legislature has enacted and proposed a variety of laws — some of them awkward and ineffective — aimed at reducing undue legislative influence over judicial appointments. An easier solution would be to follow the U.S. Constitution by permitting the governor to appoint judges with the advice and consent of the Senate.

**H 4151:** Provides for a constitutional amendment authorizing the governor to appoint judges with the confirmation of the Senate and House judiciary committees. A Judicial Merit Selection Commission would continue to review the qualifications of appointees.

**S 63:** Provides for a constitutional amendment permitting the popular election of Supreme Court and Court of Appeals judges.

**S 64:** Provides for the popular election of family court judges — which are currently chosen by the General Assembly.

**S 137:** Permits the state Supreme Court, rather than the Senate, to recommend magistrates for appointment.

**S 156:** Prohibits any person, as opposed to just formal “candidates,” from seeking a legislator’s pledge for selection to a judicial office.

**H 3269:** Prohibits candidates for offices appointed or elected by the General Assembly to make campaign contributions to legislators.

**S 58:** Prohibits members of the General Assembly from “campaigning” for a judicial candidate within two years of a judicial election by the General Assembly.

**S 231:** Requires candidates for offices voted upon by the General Assembly to submit campaign contribution forms to the Senate and House Ethics committees.

**S 397:** Prohibits senators from representing clients before magistrates recommended for appointment by that senator. (Magistrates are recommended to the governor by the Senate.)

**S 283:** Requires the Judicial Merit Selection Commission to release a list of all qualified candidates for consideration by the General Assembly, rather than the commission’s top three choices.

**S 55:** Increases from five to seven the number of Supreme Court justices.

## ✘ Undermining gubernatorial authority

### S 226: Expand Lt. Governor's Power

*Status: Referred to Judiciary Committee*

This bill would give the Lieutenant Governor full gubernatorial power when the governor is physically absent from the state. Also see S 224

► **Our take:** In short, this bill is a bad idea because the governor does not appoint his own lieutenant governor.

## Did You Know?

In the mid-1990s, all five Supreme Court justices and more than half of circuit court judges had served in the General Assembly before being elected to the bench. Source: American Judicature Society

### H 3560 (Part III): Federal Stimulus Funding

*Status: Governor's veto overridden*

Part III of the budget, challenged in court by Governor Sanford, forced the governor to use \$694 million of federal stimulus funds — i.e., money directed to the State Fiscal Stabilization Fund component of the American Recovery and Reinvestment Act — as specifically delineated by the General Assembly. Also see S 330, S 577, S 691, H 3923, H 3962

► **Our take:** The governor filed suit in federal court regarding this mandate, arguing that “the General Assembly's attempt to legislate its way around policy decisions made by the Executive Branch sets a dangerous precedent for future South Carolina governors ... and for other legislatures to disregard their governors' directives in administering a host of federal programs.” This is, no doubt, true. But it might also be said that the state Supreme Court got it right — South Carolina's executive branch really is that weak.

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### Legislation most likely to come up:

Several restructuring bills (H 3199, H 3231, H 3314) passed the House, but it is unclear what fate awaits them in the Senate. Given that Gov. Sanford's term is expiring, momentum for restructuring will have to come from grassroots support.

## **X** Increasing legislative power

### **H 3876: Extend Legislative Terms**

*Status: Referred to Judiciary Committee*

This joint resolution proposes a constitutional amendment that would extend House terms from two to four years; and Senate terms from four to six years.

### **H 3233: Speaker Appointments**

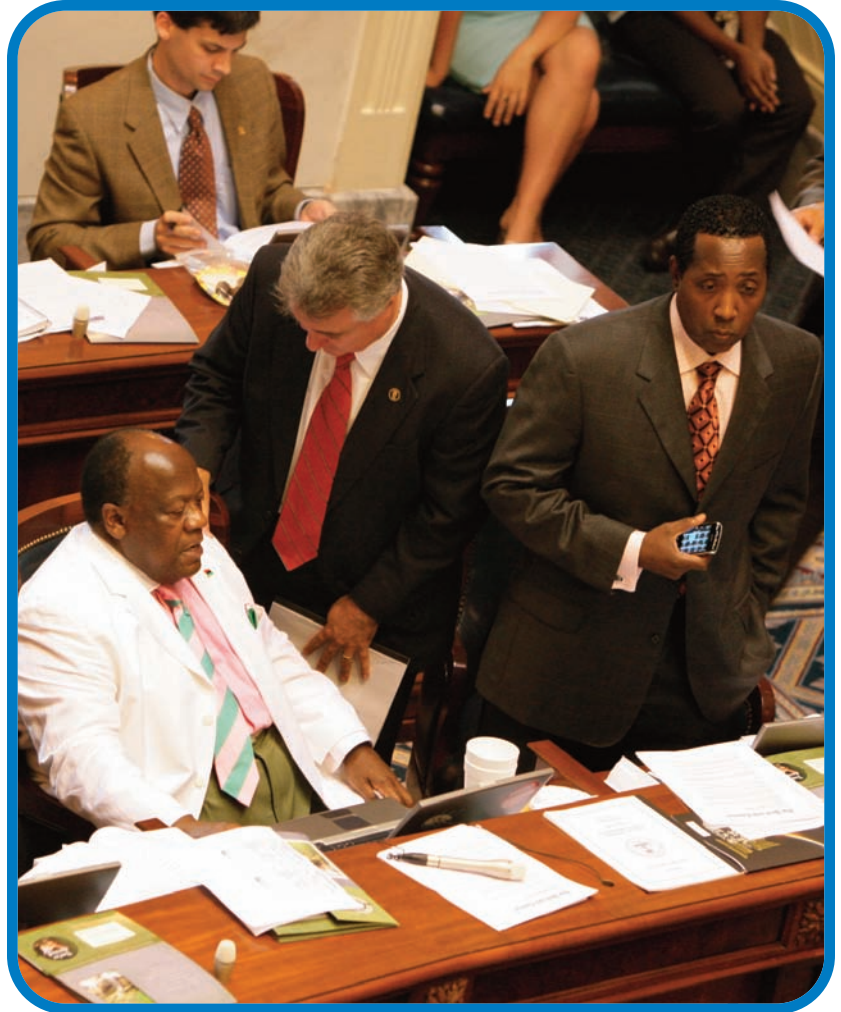
*Status: Referred to Rules Committee*

This resolution would effectively eliminate even the small amount of independence legislators may exercise within committee. It is worth noting this proposal only had two sponsors: current House Majority Leader Kenny Bingham (R-Lexington) and former Majority Leader Jim Merrill (R-Charleston).

### **H 3238: Speaker Ad Hoc Committee**

*Status: Referred to Rules Committee*

Like H 3233, this resolution is an attempt at consolidating the speaker's power. The bill would permit the speaker to appoint an ad hoc committee to vote on select bills, thus assuring these bills are voted out of committee.



*Legislators confer with each other on the floor of the Senate inside the Statehouse.*

**► Our take:** Bad, bad, bad.

## **X** Creating a legislative police force

### **S 576: Capitol Police Force**

*Status: Passed the Senate; referred to Ways & Means Committee in the House*

This bill would have established a police force under the control of the General Assembly. Failing to pass the House, the legislation was inserted into the budget (provisos 48.11; 49A.1-49A.5) and vetoed by the governor. The governor's veto was one of the few sustained by the House.

► **Our take:** After the legislature implemented a \$6.4 million security upgrade for the Capitol grounds, the governor argued the upgrades were not necessary and refused to staff the project. In retaliation, Senate President Pro Tempore Glenn McConnell (R-Charleston) proposed creating a Capital Police Force that would come under the control of a committee comprised of 6 legislators and 3 judicial appointees. The problem here is that the legislature has no right to take over what is properly an executive function. As Governor Sanford cautioned in his veto message: "The proposed Capitol Police Force is just another example of the General Assembly's unrelenting contempt for the doctrine of separation of powers. ... This means that the legislature and judicial branches will control their own police force without any check from another branch of government."

## Veto Recap

Governor Sanford issued 17 vetoes this session; none of which were sustained. Although the governor's vetoes of the budget as a whole were not sustained, the General Assembly did sustain 17 line-item vetoes. These include vetoes regarding the creation of a Capitol Police Force; vetoes regarding competitive grants; and a veto regarding Employment Security Commission salaries. Several other vetoes were initially sustained and then overridden upon a re-vote. Other bills vetoed by the governor include: a measure to regulate payday lenders; a law expanding legislative control over the Ports Authority; and legislation establishing the S.C. Housing Commission. The governor also vetoed three bills regarding snow days, arguing: "It is not in the best interest of South Carolinians for the General Assembly to spend days passing bills on school days missed."

27: Bills that became law without the governor's signature

17: Vetoes issued by the governor

17: Vetoes overridden by the General Assembly

0: Vetoes sustained by the General Assembly

49: Budget-related vetoes

17: Line-item budget vetoes sustained