



June 30, 2009

Honorable David A. Paterson
Governor of the State of New York
Executive Chamber
Albany, New York

Honorable Sheldon Silver
Speaker
New York State Assembly
Albany, New York

Dear Governor Paterson and Speaker Silver:

I write to reiterate the validity of Senate action today on numerous important and time-sensitive bills. For the reasons stated below, the Senate properly convened in regular session, obtained a quorum and passed legislation on the Senate's Active List. Accordingly, the Assembly and Governor must accept these bills as properly passed by the Senate, and these bills must be presented to the Governor for executive action.

1. Quorum Was Properly Obtained

The New York State Constitution requires that "[a] majority of each house shall constitute a quorum to do business." N.Y. Const., art. III, § 9. Senate Rules likewise define quorum as "[a] majority of all the Senators elected." Senate Rule IX, § 2. Because there are 62 Senators elected, a majority of Senators elected, or 32 Senators, constitutes a quorum of the Senate to do legislative business under the Quorum Clause of the State Constitution.

The Senate convened in Regular Session at noon today pursuant to the call of the Temporary President of the Senate, Malcolm A. Smith. As typically occurs, there was no long roll call to establish quorum: it is longstanding Senate custom and practice that a Senator's physical presence on the Senate floor suffices to establish his or her attendance for quorum purposes. Accordingly, Lisa Copeland, Deputy Journal Clerk of the Senate, identified 31 Democratic members physically present in the Senate Chamber and marked them down as present on her official roster. In addition to those 31 Senators, Ms. Copeland also identified Senator Frank Padavan (R-Queens) as being present in the Chamber at the time she properly and timely recorded attendance; numerous Senators and Senate staff also observed Senator Padavan in the Chamber at this time. Thus, Ms. Copeland marked Senator Padavan as present. These attendance records are included in the day's Senate Journal in the ordinary course of Senate business, and the Journal of the Senate is conclusive proof of the proceedings of the Senate for all purposes. See

N.Y. Const., art. III, § 10; Ohrenstein v. Thompson, 82 A.D.2d 670 (3d Dept 1981), app. dismissed, 56 N.Y.2d 644 (1982).

These authorities are well-settled: the Court of Appeals has held that a Senator, upon entering the Senate Chamber and being marked as present by the Journal Clerk, can and must be counted toward quorum for purposes of the Quorum Clause under Article III, section 9, of the New York State Constitution. See Heimbach v. State, 89 A.D.2d 138 (2d Dept. 1982), aff'd 59 N.Y.2d 891 (1983), app. dismissed 464 U.S. 956 (1984).

Senator Padavan's subsequent exit from the Chamber after being recorded as present does not and cannot render him absent from the Senate for quorum purposes. As the Heimbach Court held:

"By long-standing custom, a Senator's presence is established by his actual entry into the chamber at some point during a session day and having himself marked present by the clerk of the Senate. Thereafter, his presence is presumed to continue unless he requests that he be excused or informs the clerk of his departure."

Heimbach, 89 A.D.2d at 147.

Accordingly, Senator Padavan was properly counted toward quorum during today's proceedings.

II. Quorum, After Being Properly Established, Was Never Challenged

At no time did any Senator question the existence of a quorum after Senator Padavan left the chamber. Mason's Manual of Legislative Procedure, which is binding as a matter of law where the Constitution, applicable statutes, and legislative rules do not conclusively settle the matter, holds that:

"When a body has convened with a quorum present, it can continue to transact business as long as a quorum is present and it is presumed that the quorum continues to be present until the question of no quorum is raised or the lack of quorum is disclosed by a vote."

Mason's § 504(1) (emphasis added).

Thus, if any Senator believed that Senator Padavan's absence from the chamber left the Senate unable to do business, a motion was necessary to challenge quorum. This rule -- and its corollary that quorum cannot be collaterally challenged after the fact -- is essential to the legislative process, lest Senators claim, after passage of a bill, that the enactment somehow was infirm. Thus, absent such a motion, quorum must be deemed conclusively established as a matter of law.

III. The "Fast Roll" Procedure

Once quorum was obtained, the Senate took up non-controversial legislation by well-established "fast roll" call vote. Under Senate Rules, a non-controversial bill that no Senator requests to lay aside

must be deemed passed after the Journal Clerk calls the names of five Senators and any negative votes are counted. See Senate Rule VIII, § 6(b). On this authority, a bill voted by fast roll call is deemed passed if the number of Senators marked as present, less the number of negative votes, is at least 32 (a majority of Senators elected to the House). See N.Y. Const., art. III, § 14. Pursuant to this same Senate Rule, a “slow” roll call of all Senators is conducted for a bill only on the specific request of five Senators. See Senate Rule VIII, § 6(b).

For each of the bills that received Senate action today, no Senator requested a slow roll call and a fast roll call vote properly was taken for each bill. All bills for which 32 votes were recorded pursuant to the above well-settled procedures thereby passed the Senate.

IV. Senate Passage is Conclusive and Binding on the Assembly and Executive

The Constitution does not permit the Assembly to question Senate passage of bills. The Constitution is clear that “[e]ach house shall determine the rules of its own proceedings.” N.Y. Const., art. III, § 9. On this authority, the Constitution requires that Senate alone must determine and apply the rules of its own proceedings: the Assembly cannot collaterally challenge Senate proceedings. See also Mason’s § 760(6) (“It is not within the province of one house to question any procedural action or ruling taken by the other house”). Accordingly, once the Senate passes a bill, such Senate passage evidenced by the attestation of the Presiding Officer of the Senate on the bill jacket, see Legislative Law § 40, the Assembly must, as a matter of law, deem such bill passed by the Senate. Moreover, for Senate-passed bills previously passed by the Assembly and returned to the Assembly, the Constitution and the Court of Appeals have made clear that the Assembly has no discretion but to present such bills to the governor for executive action. See N.Y. Const., art. IV, § 7; King v. Cuomo, 81 N.Y.2d 247 (1993).

So too does the Constitution require the Governor to accept these bills as properly passed by the Senate. The Constitution is clear that upon presentment to the Governor of bills passed by both Houses, the Governor must sign, veto or withhold action on such bills. See N.Y. Const., art IV, § 7. These options do not include challenging the validity of legislative action on bills: the signature of the Presiding Officer on the bill jacket is conclusive proof of passage. See Legislative Law § 40.

For the foregoing reasons, the Senate lawfully and properly passed legislation today. We look forward to speedy enactment of these important bills into law.

Respectfully submitted,



Shelley B. Mayer
Chief Counsel
New York State Senate Majority

Cc: Peter Kiernan, Esq.
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