



Majority Counsel and Program Passage of Bills on June 30, 2009

Date: July 1, 2009

To: Majority Conference

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Our legal team has concluded that yesterday's procedures were entirely proper under the New York State Constitution, the laws of the State of New York, and long standing Senate Rules and Procedures. Accordingly, we sent a letter to the Governor and the Speaker of the Assembly demonstrating the following:

1. **The Senate Obtained a Quorum in Regular Session Yesterday**

- *31 Democrats were recorded as present in the chamber.* The Senate convened a regular session at noon yesterday. Lisa Copeland, Deputy Journal Clerk of the Senate, identified 31 Democratic members as present in the Senate Chamber and, in accordance with longstanding Senate procedure and custom, marked them as present in the Chamber.
- *Senator Padavan was also recorded as present in the chamber.* In addition to the 31 Democratic members, Ms. Copeland identified Senator Frank Padavan (R-Queens) as being present in the Chamber at the time attendance properly and timely was recorded. Many Senators and Senate staff also observed Senator Padavan in the Chamber at this time. Accordingly, 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.

2. **A Senator Counts Toward Quorum If He Enters The Chamber And Is Marked As Present By The Journal Clerk**

- The Court of Appeals in 1982 held that a Senator counts toward quorum if he enters the Senate Chamber and is marked as present by the Journal Clerk. 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).



- It is longstanding custom and practice, and well within the rules of the Senate, that the mere physical presence of a Senator on the floor during the proceedings is deemed to be attendance. Id.

3. A Senator's Exit From The Chamber After Being Recorded As Present Does Not Render Him Absent From The Senate For Quorum Purposes

- Senator Padavan, having been recorded as present for quorum purposes, is not deemed absent for quorum purposes when he leaves the chamber.
- As the Appellate Division noted in the Heimbach case: "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.

4. Quorum, After Being Properly Established, Has To Be Challenged ... And It Never Was By Sen. Padavan Or Anyone Else

- 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 in this case, holds that: "[w]hen 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." See Mason's § 504(1).

5. The "Fast Roll Call" Procedure was Typical and Valid under the Law and Rules of the Senate

- Once quorum was obtained, the Senate took up non-controversial legislation by well-established "fast roll call" vote under Senate Rule VIII, § 6(b). (Under the same rule a fast roll call is actually the *norm*. A "slow" roll call of all Senators — where each Senator is called by name and must say "aye" or "nay" — is only conducted when five Senators demand a slow roll call. *No such request was made yesterday at any time.*
- In a "fast roll call", a bill can be *passed* after the Journal Clerk calls the names of five Senators and any negative votes are counted. Under a fast roll call Senators marked as present are presumed to vote "yes" on the bill. Accordingly, if there are 32 senators present and none vote "no" then a bill is passed.



6. **The Assembly And Governor Must Deem the Bills Passed**

- 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.
- Accordingly, the Constitution requires that the Senate alone must determine and apply the rules of its own proceedings.
- The Assembly cannot legally collaterally challenge Senate proceedings.
 - 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. *Campaign for Fiscal Equity v. Marino*, 97 NY2d 235 (1995).
 - Once the Presiding Officer of the Senate certifies on a bill jacket that the Senate has passed a bill, the Assembly must consider the bill passed. See Mason's § 760(6).
- The Governor must accept these bills as properly passed by the Senate. (He can, of course, veto the bills). 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. *King v. Cuomo*, 81 N.Y. 2d 247 (1993). 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.