HENRY MCMASTER
ATTORNEY GENERAL

June 12, 2009

The Honorable Thomas C. Davis
Senator, District No. 46
P. O. Drawer 1107
Beaufort, South Carolina 29901-1107

Dear Senator Davis:

You have requested an opinion concerning the constitutionality of two provisos contained in the Appropriations Act recently enacted by the General Assembly. You note that the Governor vetoed Provisos 37.1 and 37.2 but the vetoes were overridden by the Senate on May 21. You state that "[i]n his veto message, the governor argued that those provisos were unconstitutional" and that you "expounded upon the objection in senate debate, but to no avail." Your letter states that "[i]n making my arguments, I was particularly persuaded by the South Carolina Supreme Court's holding in *Knotts v. S.C. Dept. of Natural Resources*, (2002) (copy attached)." You have enclosed your analysis of the constitutionality of the provisos, and have compared these provisions to the enactment struck down by the Supreme Court in *Knotts*. As we understand it, you do not find any significant differences between the present provisos and statute condemned by the *Knotts* Court, and thus you request that we "review [your] analysis ...."

Law / Analysis

Proviso 37.1 relates to distribution of Department of Natural Resources (DNR) funds and states in pertinent part as follows:

> (DNR: County Funds) Funds belonging to each of the counties of the State, now on hand or here after accruing to the counties, shall be expended *on approval of the majority of the respective county delegation, including the resident senator or senators, if any.*

(emphasis added). Likewise, Proviso 37.2 concerns DNR funds, and the use and distribution thereof, and reads as follows:

> (DNR: County Game Funds/Equipment Purchase) Any equipment purchased by the department from county game funds *on approval of a majority of a county delegation, including the resident senator or senators, if any*, shall remain in that county upon the request of a *majority of the respective county delegation, including the resident senator or senators, if any*, an if sold by the department, the proceeds of such sale shall be credited to such county game fund. Expenditures from the County Game Fund and he Water Resource Fund *which have the approval of the county delegation* shall be exempt from the provisions of Act 651 of 1978, as amended.

(emphasis added).

Our Supreme Court has consistently recognized that the separation of powers doctrine [under Art. I, § 8 of the S.C. Constitution] prevents one branch of government from usurping the power and authority of another. *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 603, 614 S.E.2d 629 (2005). In *Knotts v. S.C. D.N.R.*, 348 S.C. 1, 558 S.E.2d 511 (2002), our Supreme Court addressed the constitutionality under Art. I, § 8 of the statutory method of allocation of monies from the Water Recreational Resource Fund (W.R.R.F.). The statute in question (S.C. Code Ann. Sec. 12-28-2730) provided that W.R.R.F. funds "must be allocated based upon the number of boats or other watercraft registered in each county pursuant to law and expended, *subject to the approval of a majority of the county legislative delegation, including a majority of the resident senators, if any* for purpose of water recreational resources." (emphasis added).

DNR there asserted that this statute violated Art. I, § 8 of the Constitution in that delegations of executive functions to the legislative delegations constituted a usurpation by the Legislature of executive authority. Noting that every statute is presumed constitutional, and will not be declared unconstitutional unless its invalidity is clear beyond reasonable doubt, the Court referenced a long line of decisions in South Carolina concluding that, consistent with Art. I, § 8, a legislative delegation would not be empowered to exercise executive authority or to execute the laws. In particular, the Court found *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257 (1938) instructive. The *Knotts* Court explained as follows:

> D.N.R. bears the burden of proving the statute unconstitutional. *Home Health Serv., Inc. v. South Carolina Tax Comm'n*, 312 S.C. 324, 440 S.E.2d 375 (1994). To carry this burden D.N.R. cites the following cases: *Tucker v. South Carolina Dep't of Highways & Pub. Transp.*, 309 S.C. 395, 424 S.E.2d 468 (1992) (*Tucker* I); *Gunter v. Blanton*, 259 S.C. 436, 192 S.E.2d 473 (1972); *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257 (1938).
>
> This Court in *Bramlette v. Stringer, supra*, found unconstitutional a statute authorizing a bond issue to improve a county's roads. The statute impermissibly

delegated a variety of powers to the county legislative delegation, including the ability to determine the amount of the bonds issued, the process for issuing the bonds, and which roads to improve.

This Court began its analysis by noting an act is presumed complete after leaving the hands of the Legislature. The *Bramlette* statute failed because it created the framework of a law whose interior would be finished by a legislative delegation assuming executive duties. We grounded the Bramlette holding in the basic concept of separation of powers that a legislative body cannot reserve for itself powers given solely to the executive branch.

Delegation attempts to distinguish *Bramlette* from the present case by focusing on who ultimately spends the funds. Delegation insists the *Bramlette* statute wrongfully gave the legislative delegation broad powers to expend the funds while S.C.Code Ann. § 12-28-2730 allows Delegation to merely approve requests leaving to the parties receiving the funds the unfettered discretion in spending the appropriation. We disagree with this interpretation of *Bramlette*.

Separation of powers is not predicated on differentiating between who actually spends the money, but on whether the legislative branch assumes powers belonging to another branch of government. Once the legislature enacts a law all that remains is the efficient enforcement and execution of that law. *Bramlette*, 186 S.C. at 134, 195 S.E. at 258. Regardless of who spends the money, § 12-28-2730 is unconstitutional because a legislative delegation may not execute or enforce a law.

This Court in *Gunter v. Blanton, supra*, found a statute unconstitutionally allowed a school board to adopt tax increases only with the approval of its county legislative delegation. We held the Legislature could delegate its taxing power to the school board, but it could not tie that power to the legislative delegation's approval. We ruled the statute could not "authorize the members of the delegation to participate in this determination as legislators, for they may exercise legislative power only as members of the General Assembly." *Id.*, 259 S.C. at 441, 192 S.E.2d at 475. The statute impermissibly empowered a legislative delegation to effectively veto a tax increase with which it disagreed. *See also Aiken County Bd. of Educ. v. Knotts*, 274 S.C. 144, 262 S.E.2d 14 (1980) (This Court adopted the *Gunter* analysis to find a similar statute unconstitutional).

Delegation distinguishes *Gunter* because it did not address a legislative delegation's power to approve expenditures. The *Gunter* rationale prohibits the Legislature from undertaking "to both pass laws and execute them by setting its own members to the

task of discharging such functions by virtue of their office as legislators." *Aiken County Bd. of Educ. v. Knotts*, 274 S.C. at 149-50, 262 S.E.2d at 17.

Contrary to Delegation's assertions the rationale underlying *Gunter* and *Aiken* undermines the constitutionality of S.C.Code Ann. § 12-28-2730. The statute clearly permits the Legislature to execute a law it has passed by empowering its own members to administer the law by virtue of their office as legislators. See *Gunter v. Blanton*, 259 S.C. at 441, 192 S.E.2d at 475; *see also, Aiken County Bd. of Educ. v. Knotts*, 274 S.C. at 149-50, 262 S.E.2d at 17.

Delegation argues its approval under § 12-28-2730 is merely incidental to the Legislature's appropriation authority. *See Aiken County Bd. of Educ. v. Knotts*, 274 S.C. 144, 262 S.E.2d at 17 (A Legislature may "engage in the discharge of such functions to the extent only that their performance is reasonably incidental to the full and effective exercise of its legislative powers."). We disagree because Delegation's interpretation undermines the doctrine of separation of powers.

The Legislature has the power to delineate how an executive department may fund a request under the W.R.R.F. The Legislature may statutorily outline how D.N.R. must expend money from W.R.R.F. by clarifying the term "water recreational purposes." The Legislature may allow legislative delegations to make suggestions on how to spend W.R.R.F. funds. *See Tucker v. South Carolina Dep't of Highways and Pub. Transp.*, 314 S.C. 131, 442 S.E.2d 171 (1994) *(Tucker* II). However, the Legislature does not have the power to create a law then execute it. The power to execute a law is not incidental to the power to appropriate, but is a separate executive power.

In *Tucker* I, *supra*, this Court held a legislative delegation could not approve highway fund expenditures or enter into contracts for highway improvements on behalf of the county. We adopted the *Gunter* and *Aiken* rationale that separation of powers mandates the Legislature "may not undertake both to pass laws and to execute them by bestowing upon its own members functions that belong to other branches of government." *Tucker I*, 309 S.C. at 396, 424 S.E.2d at 469.

S.C.Code Ann. § 12-28-2730 unconstitutionally usurps executive powers for the benefit of legislative delegations. ... The Legislature is constitutionally forbidden from undertaking to pass laws and then to execute them by bestowing upon its own members powers belonging to the executive branch.

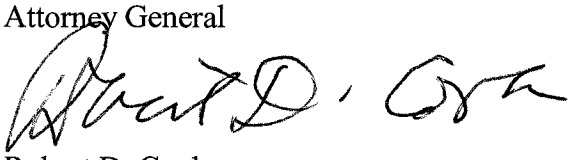
348 S.C. at 6-9, 558 S.E.2d at 513-515.

Conclusion

Your letter and accompanying analysis concludes that there is no significant distinction between the statute found unconstitutional in *Knotts* and the two provisos in question here. We agree. While the language may vary slightly from the statute declared defective in *Knotts*, the constitutional principle of separation of powers is exactly the same. As *Knotts* stated, "[t]he Legislature is constitutionally forbidden from undertaking to pass laws and then to execute them by bestowing upon its own members powers belonging to the executive branch." As we read the Provisos in question, that is what these provisions do – they authorize the legislative delegations to execute the law by expending the funds generated pursuant to the Provisos. As our Court recently emphasized in *Edwards et al. v. State, et al.* (stimulus case) Op. No. 26662 (June 4, 2009), "[t]he administration of appropriations is a function of the executive department." Accordingly, it is our opinion that a court would likely conclude that these provisos are unconstitutional in violation of Art. I, § 8 of the South Carolina Constitution.[1]

Yours very truly,

Henry McMaster
Attorney General



By: Robert D. Cook
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[1] In addition, only a court could determine whether the requirement of legislative delegation approval is severable. *Knotts, Id.*