ALAN WILSON
ATTORNEY GENERAL

December 9, 2011

Jeffrey B. Moore, Executive Director
South Carolina Sheriffs' Association
112 Westpark Boulevard
Columbia, SC 29210

Dear Mr. Moore:

We received your request for an opinion from this office regarding the constitutional validity of proposed "Sheriffs First" legislation.

The proposed legislation requires federal employees who would act in a county for the purpose of making federal arrests, searches or seizures, and who are not designated by South Carolina law as South Carolina peace officers, to first obtain written permission from the county sheriff or designee of the county sheriff in which the arrest, search or seizure will occur. The legislation also provides that the county sheriff or designee of the county sheriff "may refuse permission for any reason that the sheriff or designee considers sufficient." An exception exists when the arrest, search or seizure will take place on a federal enclave for which jurisdiction has been ceded to the United States by a South Carolina statute. A federal employee may also obtain written permission from the South Carolina Attorney General, who also "may refuse the permission for any reason that the attorney general considers sufficient." The legislation sets forth information which must be included in the request for written permission, including the name of the subject of the arrest, search or seizure; a statement of probable cause or a federal arrest, search or seizure warrant that contains probable cause; a description of the property to be searched or seized; and a specific statement of the address, date, and time of the arrest, search or seizure. The request for permission must be in letter form, and counter-signed by the county sheriff or designee, or by the Attorney General, to constitute valid permission under the proposed legislation. The permission is valid for 48 hours.

The proposed legislation further provides that an arrest, search or seizure in violation of the provisions subjects the individuals involved to prosecution for kidnapping if an arrest or attempted arrest occurred; for trespass if a search or attempted search occurred; and for theft if a seizure or attempted seizure occurred; and for any applicable homicide offense is loss of life occurred. Victims' rights provisions under state law are also provided to persons affected by violations of the provisions of the legislation. Additionally, the Circuit solicitors are given "no discretion not to prosecute" once a violation is alleged by a county sheriff or designee of the sheriff under the proposed legislation, and the failure to prosecute subjects the solicitor to immediate suspension without pay and to prosecution by the Attorney General for official misconduct.

Finally, the proposed legislation declares that any federal law purporting to give federal employees the authority of a county sheriff in South Carolina is not recognized, and is specifically rejected and declared to be invalid.

Law/Analysis

We begin our analysis by noting that the proposed legislation, if enacted, would be entitled to a strong presumption of validity. As we stated in an opinion of this office dated May 2, 2005:

> . . . any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
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> Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

Turning to your specific question, we note the most obvious legal challenge to the proposed legislation effecting federal law enforcement of federal laws in South Carolina is an allegation that it violates the Supremacy Clause of the United States Constitution.[1] Although the Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," see Gregory v. Ashcroft, 501 U.S. 452 (1991), decisions of the United States Supreme Court establish that where federal and state law conflict, state law must yield pursuant to the Supremacy Clause. This principle is captured in Article VI of the Constitution, which reads: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . ., any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const., art VI, cl. 2. Soon after the creation of our federal system, the Supreme

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[1] It is the prerogative of South Carolina to "prescribe the qualifications of its officers and the manner in which they shall be chosen." Cabell v. Chavez-Salido, 454 U.S. 432, 440 n.7 (1982); see Op. S.C. Atty. Gen., June 8, 1993 ["Law enforcement is a proper exercise of this State's police power"]; cf. S.C. Code Ann. §§23-23-10 *et seq.* The enforcement of state criminal laws by federal law enforcement officers is, however, not addressed in the proposed legislation and is thus beyond the scope of this opinion. See §23-1-212 ["Enforcement of state criminal laws by federal law enforcement officers"]; see also Ops. S.C. Atty. Gen., June 18, 2003; March 6, 2002.

Court explained that the Supremacy Clause was designed to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); see Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.) ("[A]cts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress . . . is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it"); see also Printz v. United States, 521 U.S. 898, 913 (1997) (states are duty-bound "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law[;] . . . all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid"); Maryland v. Louisiana, 451 U.S. 725, 746 (1981) [under the Supremacy Clause, the federal law displaces the state law, and the state law is rendered entirely void and "without effect"]; City of Cayce v. Norfolk Southern Railway Co., 391 S.C. 395, 706 S.E.2d 6, 8 (2011) [same].

The Supremacy Clause displaces state law so long as state law affects the operation of federal law, notwithstanding the fact that the state legislature did not enact such law expressly to frustrate the federal objective. See Perez v. Campbell, 402 U.S. 637, 651-52 (1971).

> Preemption occurs when Congress . . . expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible ... or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service v. FCC, 476 U.S. 355, 368-69 (1986).

The Supreme Court has ruled that there are areas of unique federal interest that are "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed . . . by the courts." Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988). Effective federal law enforcement, including efforts by the United States to uncover, investigate and prosecute violations of federal law, unquestionably is one such interest. Rovario v. United States, 353 U.S. 53, 59 (1957). State peace officers and federal officers derive their power from the authority of different and independent governments. See Printz, 521 U.S. at 929 & n.14. Congress has enacted specific federal statutes governing law enforcement efforts by the United States to investigate whether there is evidence of a violation of federal law. See, *e.g.*, 18 U.S.C. §3052 [granting FBI agents authority to investigate and arrest for offenses against laws of the United States]; 18 U.S.C. §3061 [granting postal inspectors authority to investigate, arrest, and search pursuant to the commission of offenses against the United States].[2]

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[2] In Printz, the Supreme Court determined that the Brady Handgun Violence Prevention Act violated the Tenth Amendment, because it required state officers to perform background checks. Id., 521 U.S. at 933. This requirement impermissibly commandeered the state's law enforcement personnel to execute a federal law, and thereby infringed on the state's sovereignty. Id. at 935; see also New York v. United States, 505 U.S. 144, 188 (1992) [Congress cannot compel state legislatures to take certain actions]. In contrast, Congress here has given agencies of the United States authority to conduct investigations and prosecute violations of federal law. States do not retain a sovereign interest in not having their laws within the ambit of the Supremacy Clause in this regard. Cf. Greier v. American Honda Motor Co., Inc., 529 U.S. 861, 893 (2000).

The Supremacy Clause would thus serve to prevent state law or state law officials from interfering with or otherwise impeding federal officers as they perform their lawful duties. See Tennessee v. Davis, 100 U.S. 257, 263 (1880) ("No state government can exclude [the federal government] from the exercise of any authority conferred upon it by the Constitution [or] obstruct its authorized officers against its will . . ."); Baucom v. Martin, 677 F.2d 1346, 1351 (11th Cir. 1982) ("[s]ufficient urgency [justifying preemption of state law] exists in avoiding state interference with an on-going federal criminal investigation"). The Supreme Court explained this principle in In re Neagle, 135 U.S. 1 (1890), where California sought to prosecute a United States deputy marshal assigned to protect a state Justice during his circuit assignment after the marshal shot and killed an angry litigant. In Neagle, the Court held that the marshal was immune from state prosecution: "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California." Id. at 75. The Court explained that under the Constitution, the United States "may, by means of physical force, exercised through its official agents, execute ... the powers and functions that belong to it" free from the interference of state law. Id. at 60-61; see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ["just as state law may not authorize federal agents to violate the Fourth Amendment . . . neither may state law undertake to limit the extent to which federal authority can be exercised"]; Davis, 100 U.S. at 262 [noting that the government can act only through its officers and agents, who must act within the States' territories, and allowing state law to interfere with government officers would paralyze governmental functions]; Martin v. Hunter's, 14 U.S. (1 Wheat. 363) 304, 363 (1816) (Johnson, J., concurring) ("[T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force . . . or judicial process . . . are the only means to which governments can resort in the exercise of their authority").

Neagle has broader applications applicable here, standing for the proposition that an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law. An act cannot simultaneously be necessary to the execution of a duty under the laws of the United States and an offense to the laws of a state. To the contrary, the obligations imposed by federal law are supreme, and where any supposed right or claim under state law would impede an officer from performing his duties, it must relent. See Johnson v. Maryland, 254 U.S. 51, 56–57 (1920) (Holmes, J.) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States"); Ohio v. Thomas, 173 U.S. 276, 283 (1899) ("When discharging [their] duties under [F]ederal authority pursuant to and by virtue of valid Federal laws, [Federal officers] are not subject to arrest or other liability under the laws of the State in which their duties are performed").

In fact, we observe that courts have almost universally invoked Supremacy Clause immunity to protect the operations of the federal government and persons acting under its direction. See, *e.g.*, Hunter v. Wood, 209 U.S. 205 (1908) [railroad official acting under a federal injunction who was charged under state law with overcharging for a railroad ticket]; Boske v. Comingore, 177 U.S. 459 (1900) [Treasury official who, pursuant to federal regulations, refused to produce records to state officials]; West Virginia v. Laing, 133 F. 887 (4th Cir. 1904) [two citizens enlisted by federal marshals as a *posse comitatus* to help serve a federal arrest warrant shot and killed the subject of the warrant]; Brown v. Nationsbank, 188 F.3d

579 (5th Cir. 1991) [private defendants acting under FBI direction are shielded from state law claims]; Kentucky v. Long, 837 F.2d 727, 745 (6th Cir.1988) [FBI agent who allegedly committed a burglary as part of an undercover operation; "a mistake in judgment or a 'botched operation,' so to speak, will not of itself subject a federal agent to state court prosecution"]; Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) [federal narcotics agent immune to state murder prosecution for shooting fleeing felon]; Baucom, 677 F.2d at 1350-51 [FBI agent who bribed a state prosecutor in an undercover operation]; Ex Parte Beach, 259 F. 956 (S.D. Cal. 1919) [customs agent who fired shots at the roadster of a suspected opium smuggler]; Connecticut v. Marra, 528 F. Supp. 381, 386 (D. Conn. 1981) [Federal Informant who, in an "error resulting from confusion or nervousness or bad judgment," exceeded his authority and attempted to bribe a police officer]; In re Turner, 119 F. 231, 235 (S.D. Iowa 1902) [federal officer constructing sewer pipe to army base against prosecution for violation of a state injunction; "an officer of the United States . . . acting in obedience to commands . . . is not subject to arrest on a warrant or order of a state court"]; In re McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964) [United States marshals used tear gas to disperse large crowd challenging integration at state university; state charged United States Marshal with breach of peace and felonious use of force]; United States ex rel. Flynn v. Fuellhart, 106 F. 911 (W.D. Pa. 1901) [Secret Service agents charged with assault and battery for arresting a counterfeiter]; United States ex rel. McSweeney v. Fullhart, 47 F. 802 (W.D. Pa. 1891) [United States marshals drew their guns at state constables while escorting a federal arrestee into custody]; Texas v. Carley, 885 F. Supp. 940 (W.D. Tex. 1994) [Fish and Wildlife officer charged with criminal trespass while making National Wetlands Inventory]; Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945) [naval shore patrolman charged with assault for striking city policeman who interfered with arrest of a serviceman]; In re Lewis, 83 F. 159, 160 (D. Wash. 1897) [Treasury agents who, with "bad judgment," executed an illegal search warrant].[3]

Consistent with the Court's Neagle decision, the courts have held that federal agents are immune from state prosecution even when their conduct violated internal agency regulations or exceeded their express authority, so long as the agents did not act out of malice or with criminal intent. For example, the court in Long affirmed the federal district court's dismissal of a burglary indictment against an FBI agent who had violated internal FBI regulations regarding the documentation of contacts with informants, based on the district court's findings that the agent had no motive other than to discharge his duty under the circumstances as they appeared to him, and that he had an honest and reasonable belief that what he did was necessary to the performance of his duty. Id., 837 F.2d at 740, 752; see also Baucom, 677 F.2d at 1350 [federal agent who used undercover operations in connection with investigation of possible federal crimes held immune under Supremacy Clause from state prosecution for attempted bribery when he did not act out of "any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it"]; Marra, 528 F. Supp. At 387 [affirming dismissal of bribery prosecution on Supremacy Clause grounds where defendant had exceeded his authorization but acted without criminal intent and honestly believed his actions were necessary to his assigned mission]. Even when courts have questioned the legality of the mission in connection with which the federal officer was acting, the officer has not

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[3] The Supremacy Clause further precludes state authorities from second-guessing federal determinations that individuals are qualified to engage in federally-regulated professions. See, *e.g.*, Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956) [holding Arkansas licensing law could not be enforced against federal contractor retained to perform construction work]; United States v. Virginia, 139 F.3d 984 (4th Cir. 1998) [holding Supremacy Clause prohibited Virginia from enforcing licensing requirements against private investigators hired by contract to work for the FBI].

been held subject to state prosecution as long as he had an honest and reasonable belief that what he did was necessary in the performance of his duty.

In In re Lewis, the court granted a writ of habeas corpus for a federal marshal who wrongfully seized some private papers while executing a search warrant. The court stated:

> . . . the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government.

Id., 83 F. at 160; see also In re Fair, 100 F. 149 (D. Neb. 1900) [a state could not prosecute an infantry soldier who, following orders, shot and killed escaping prisoner when an order to halt was not obeyed, even though the orders to shoot were questionable in light of Infantry Regulations].

Additionally, we refer to art. I, §8 of the South Carolina Constitution, which mandates that each of the three branches of government be kept separate. Such provision states that:

> "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

Thus, each of the three coordinate Branches of government, namely the Executive, the Legislative and the Judicial, is within the sphere of its constitutional and governmental powers, independent and free from the control of the others. Within these limits, the Legislative Branch cannot control the Executive Branch, nor the Executive Branch control the Legislative Branch. See Ops. S.C. Atty. Gen., March 31, 2009; August 20, 1973. The South Carolina Supreme Court stated in State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633, 636 (1982):

> [o]ne of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

The Executive, the Legislative and the Judicial Branches have been characterized as "branches of the Government coordinate in rank" with each other. O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945) (Oxner, J., dissenting in part).

Under the separation of powers doctrine, South Carolina cases hold the Executive Branch is vested with the power to decide when and how to prosecute a case, and that the unfettered discretion to prosecute is solely in the prosecutor's hands. See, *e.g.*, Ex parte Littlefield v.Williams, 343 S.C. 212, 540 S.E.2d 81, 84 (2000); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 346-47 (1994); see also State v. Burdette, 335 S.C. 34, 515 S.E.2d 525, 528-29 (1999) ("[c]hoosing which crime to charge a defendant with is the essence of prosecutorial discretion"); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, 686 (1996) ("The decision whether to offer a plea bargain is within the solicitor's discretion. . . . This Court is not empowered to infringe upon the exercise of this prosecutorial discretion"). The prosecutor may, therefore, decide when and where to present an indictment, and may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. See Ops. S.C. Atty. Gen., September 19, 2008; April 18, 2006; October 29, 2004. Neither the Judicial Branch nor the Legislative Branch is empowered to infringe on the exercise of this prosecutorial discretion. See Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997) [under our separation of powers doctrine, judicial discretion cannot be substituted for that of an executive body]; Thrift, 440 S.E.2d at 346-47 [judicial department cannot infringe on unfettered prosecutorial discretion].

A prosecutor's discretion is not without bounds. For example, in Ex parte Littlefield, the South Carolina Supreme Court indicated that:

> [a]lthough prosecutorial discretion is broad, it is not unlimited. The judiciary is empowered to infringe on the exercise of prosecutorial discretion when it is necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates. . . . For example, the judiciary may infringe on prosecutorial discretion where the prosecutor bases the decision to prosecute on unjustifiable standards such as race, religion or other arbitrary factors. [Citation omitted]. The judiciary can also check prosecutorial discretion by dismissing flawed indictments, directing a mistrial of a case wrongfully brought or prosecuted, or granting a directed verdict for lack of credible evidence.

Id., 540 S.E.2d at 84; see also Thrift, 440 S.E.2d at 346-47 [a court must analyze a prosecutor's plea agreement within its judicial constraints]; cf. S.C. Const. art. V, §24 [designating the Attorney General as "the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record"].

The mandatory nature of the proposed legislation with respect to Circuit solicitors, however, interferes with the prosecutorial rights enumerated above, which would thus likely render it a violation of the separation of powers doctrine. Although South Carolina courts recognize that the penalty assessed for a particular offense is, except in the rarest of cases, "'purely a matter of legislative prerogative," and that the General Assembly's judgment in this regard will not be disturbed by the courts, see State v. De La Cruz, 302 S.C. 13, 393 S.E.2d 184, 186 (1990), the discretion which a prosecutor retains as to whether or not to proceed to trial with a particular case, or even bring the case at all, nevertheless remains quite broad. For instance, as to mandatory sentencing guidelines, as indicated by the South Carolina Supreme Court in Burdette, "[u]nder the mandatory sentencing guidelines, the prosecutor can still choose not to pursue the triggering offenses or to plea the charges down to non-triggering offenses. Choosing which

crime to charge a defendant with is the essence of prosecutorial discretion, not choosing which sentence the court shall impose upon conviction." Id., 515 S.E.2d at 528-529.

In Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798, 803 (1953), the South Carolina Supreme Court noted that the General Assembly has full power to make any and all laws which it considers beneficial to the State and its people, unless such laws run counter to some limitation or prohibition of the South Carolina Constitution. In an opinion of this office dated March 31, 2009, we noted that:

> [a]lthough the [General Assembly] may enact laws, it does not possess the power to execute or compel the executive branch to execute the law. Execution of the law is reserved to the executive branch under our system of separation of powers, and it would violate the constitutional provision requiring such separation for the [General Assembly] to exercise such coercive power over the executive.

By way of further example, we note the South Carolina Supreme Court in Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980) addressed the constitutionality of §2-1-150, which granted immunity from court appearances to lawyer-legislators during legislative sessions and committee meetings. The Court noted that "[i]t has long been the rule in this State that motions for continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant." Id., 262 S.E.2d at 883. Moreover, according to the Court:

> [t]he judicial power is vested, under Article 5, Section 1, of the Constitution of this State, in the unified judicial system. The authority to determine whether a continuance should be granted or denied is inherent, in the exercise of this judicial power, and cannot be exercised by the legislative branch of the government. Therefore, Code Section 2-1-150, in so far as it attempts to exercise the ultimate authority to determine when, and under what circumstances, lawyer-legislators may be exempt from court appearances, is unconstitutional as violative of the principle of separation of powers.

Id., 262 S.E.2d at 884.

Likewise, in Thrift, a defendant was indicted for violation of the pre-1991 Ethics Act. The "old" Ethics Act contained language requiring a referral from the Ethics Commission to the Attorney General before prosecution could be maintained. On appeal, the defendant argued the requirement of referral thereby placed the decision to prosecute in the hands of the Ethics Commission, not the Attorney General. The South Carolina Supreme Court disagreed, stating:

> [Article V, § 24] is dispositive that any requirement which places the authority to supervise the prosecution of a criminal case in the hands of the Ethics Commission is unconstitutional. As noted earlier in the plea agreement issue, the prosecution has wide latitude in selecting what cases to prosecute and what cases to plea bargain. This power arises from our State Constitution and cannot be impaired by legislation.

Thrift, 440 S.E.2d at 355. Thus, under Thrift, the decision to prosecute is constitutionally granted to the Executive Branch; such authority cannot be impaired by the Legislature. See also State v. Peake, 345 S.C. 72, 545 S.E.2d 840, 843-844 (Ct. App. 2001) [holding that any agreement by official of Department of Health and Environmental Control to forgo prosecuting developer for abandoning wastewater treatment system in return for transfer of facility to State did not estop State from prosecuting developer for abandoning wastewater treatment plant in violation of Pollution Control Act, since the Department official had no power to decide which cases to prosecute].

Conclusion

Our analysis of the proposed "Sheriffs First" legislation is limited to identifying characteristics of the legislation which may render it susceptible to a court challenge on constitutional grounds. The proposed legislation, which requires review and written permission by a county sheriff or a designee of the county sheriff, or the South Carolina Attorney General, prior to federal arrests, searches or seizures by federal employees, and grants also authority to these state officials to refuse permission for "any reason" they consider sufficient, would undeniably interfere with and/or prohibit conduct explicitly authorized by federal law and touch upon a unique area of federal concern - - the enforcement of the federal criminal laws. A court would likely conclude that the proposed legislation which regulates federal law enforcement would thus be preempted by the Supremacy Clause of the United States Constitution. Under the Supremacy Clause, state law cannot operate to impede individuals who have federal authority to enforce federal laws, and who act as necessary and proper within that federal authority. If federal employees are to perform their duties vigorously, they cannot be unduly constrained or undermined by fear of state prosecutions. We believe a court would likely conclude that to apply the state law in the manner proposed here would frustrate important federal interests in violation of the Supremacy Clause.

Additionally, there can be no doubt that the doctrine of separation of powers requires respect for the independence of the prosecutors in this state, who have a wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal laws of this state. In the opinion of this office, a court would likely conclude that removing prosecutorial discretion for alleged violations of the provisions of the proposed legislation is violative of art. I, §8 of the South Carolina Constitution which mandates a separation of powers.

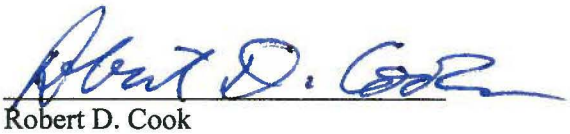
Accordingly, after our review of the proposed legislation, in our opinion, and notwithstanding the presumption of constitutionality which must be given statutes and the duty of the courts to construe a statute in a constitutional manner, we believe the legislation, if enacted, would be constitutionally suspect. It is our opinion that a court would likely conclude, for all the reasons set forth above, that the proposed legislation is unconstitutional.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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