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The State of South Carolina

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July 13, 1989

Dr. Rodger E. Stroup, Chief Curator
South Carolina State Museum
Post Office Box 100107
Columbia, South Carolina 29202-3107

Dear Dr. Stroup:

In your letter of April 5, 1989, you requested an opinion concerning whether any South Carolina law would prohibit the South Carolina Museum Commission from purchasing a particular historical artifact jointly with the National Museum of American History of the Smithsonian Institution. I understand that the artifact is a South Carolina regimental flag which was captured by British forces at Savannah in 1779. I further understand that the Museum Commission wishes to pay half of the purchase price of the flag and own it jointly with the national museum, with the two museums sharing possession on an equally rotating basis, for periods of five years.

The threshold standard for an expenditure of State money is that it must be for a public purpose 1/ South Carolina courts long have recognized that educational, historical and recreational programs for the State's citizens meet this standard. 2/ Because your inquiry concerns the acquisition, preservation and display of a unique artifact which is closely connected to the political and military events which gave rise to the State's existence, I conclude that such a purchase would be central to the State Museum's historical and educational mission, and it therefore would meet the public purpose test.

1/ See, for example, Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975).

2/ Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355 (1969).

Further, as a legislatively created entity which functions on behalf of the State, the Museum Commission is empowered to act only within the bounds of its legislative mandate, as defined by its enabling statutes. Any action which the Commission proposes to take must be statutorily authorized, either expressly or by necessary implication. S.C. Code § 60-13-30 provides, in relevant part, that "[t]he primary function of the Commission shall be the creation and operation of a State Museum reflecting the history... of the State ..., utilizing all available resources in the performance of this function." In pursuit of its goal, the Commission is authorized in S.C. Code § 60-13-40(6) to "control the expenditure ... of ... public funds ...."

Although the statutes do not mention acquisitions by purchase specifically, one could argue reasonably that the "creation and operation" of any museum would require the acquisition of items for display, presumably through the ordinary means of purchase and gift. Particularly in the case of a state museum, which has a historical mission, within a specifically-defined geographic area, one would expect that purchase would often provide the only route to purposeful acquisition of the one-of-a-kind artifacts necessary to build its collection. Certainly, this flag is such a unique item, which "reflect[s] the history" of the State, 3/ such that the Legislature's description of the Commission's role necessarily implies the power to make this purchase.

The significant issue is whether the proposed joint purchase and ownership is permissible. Article VIII, § 13, of the South Carolina Constitution sanctions agreements whereby the State shares the costs and benefits of authorized functions with other governmental entities, as follows:

> .... Nothing in this Constitution shall be construed to prohibit the State ... from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, whether within or without this State.... 4/

3/ I understand that the flag belonged to a South Carolina regiment which defended Fort Moultrie in 1776, from which engagement the State's use of the Palmetto tree as its primary symbol evolved.

4/ Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982). In fact, an Illinois court held in Antle v. Tuchbreiter, 414 Ill. 571, 111 N.E.2d 836, 841 (1853) that the authority of a state to enter into a contract with the United States is derived from the supremacy clause of the United States Constitution and cannot be inhibited by a state constitutional provision.

The proposed arrangement with the Smithsonian comes within this permissive section of the Constitution to the extent that it contemplates that the two museums will share the cost of purchasing, the responsibility of preserving, and the function of displaying the flag.

Although the federal statutes incorporating, and otherwise pertaining to, the Smithsonian Institution (and the museums and other units of which it is composed) do not define the Institution's exact status or specify the type of relationship it has with the government of the United States, the weight of evidence indicates that the Institution operates as an arm of the federal government, for the benefit of the public. Considerations which support this conclusion include the following:

1. The Institution's Board of Regents is composed of high level officials of the three branches of the United States government, some serving ex officio and the remainder appointed by joint resolution of the Congress. 5/

2. The Institution is authorized to receive all "objects of natural history, plants, and geological and mineralogical specimens belonging to the United States." 6/

3. Federal courts have determined that the Institution is a "national museum, created by an act of Congress" such that a donation to it by state officials has been upheld. 7/

4. When the Institution or its officers are named in lawsuits, the United States Department of Justice represents their interests. 8/

5. Employees of the Institution are considered employees of the federal government. 9/

5/ 20 U.S.C. § 41 et seq. (1976).

6/ 20 U.S.C. § 50 (1976).

7/ People of State of California ex rel. Younger v. Mead, 618 F.2d 618, 621 (9th Cir. 1980).

8/ Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, et al., 566 F.2d 289 (D.C. Cir. 1977).

9/ Id. at 296.

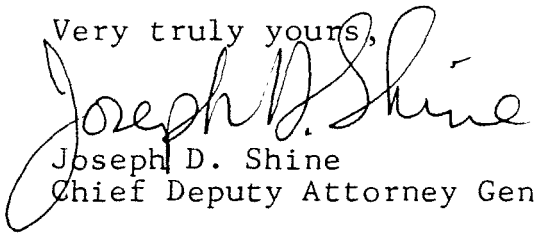
6. The Institution comes within the purview of the Federal Tort Claims Act. 10/

7. In-house counsel to the Smithsonian Institution consider it to be a "trust instrumentability" of the United States. 11/

For the foregoing reasons, the joint participation of the National Museum of American History of the Smithsonian Institution with the South Carolina Museum Commission, as proposed in this case, comes within the scope of inter-governmental enterprises sanctioned by Article VIII, § 13 of the South Carolina Constitution. Additionally, I am not aware of any other provision of State law which would prohibit the proposed arrangement.

I have received your letter of July 3, 1989, with the draft agreements, and will be able to respond to any questions concerning those in the near future. In the meantime, please let me know if you need any further information regarding this particular question.

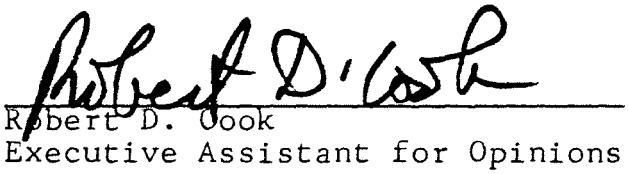
Very truly yours,



Joseph D. Shine
Chief Deputy Attorney General

JDS:djs

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

10/ 36 C.F.R. § 530.1 (1988).

11/ Telephone conversation May 2, 1989, with Alan Ullberg, Esquire, of the Office of General Counsel, Smithsonian Institution.