2738 Library

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3680

June 17, 1987

The Honorable John Courson
Member, South Carolina Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Courson:

Your letter dated April 21, 1987, to Attorney General Medlock has been referred to me for response. By your letter, you requested an opinion concerning the following question:

> May the Governor, as the Chief Executive Officer of the State and Chairman of the Budget and Control Board, unilaterally direct the Division of General Services to remove the Confederate Battle Flag?

In 1962 the South Carolina General Assembly passed the following:

> H. 2261.-Messrs. MAY and LeaMOND: A Concurrent Resolution requesting the Director of the Division of Sinking Funds and Property to have the Confederate Flag flown on the flagpole on top of the State House.
>
> Be it resolved by the House of Representatives, the Senate concurring:
>
> That the Director of the Division of Sinking Funds and Property is hereby requested to have the Confederate Flag flown on the flagpole on top of the State House.

This concurrent resolution[1] is relevant to your inquiry.

The Constitution of the State of South Carolina provides:

> In 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 the said departments shall assume or discharge the duties of any other.

S.C. Const. art. I, §8. Article III of the South Carolina Constitution relates to the legislative department and article IV relates to the executive department. S.C. Const. art. III & art. IV.

Considering these constitutional provisions, the South Carolina Supreme Court has stated:

> One 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.

State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

The South Carolina Supreme Court has held that the South Carolina 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. Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). In addition, the South Carolina Supreme

---

[1]In a 1968 opinion of this Office, this resolution was inaccurately characterized as a "joint resolution." See S.C. Atty. Gen. Op., May 8, 1968.

Court has held that the General Assembly may properly exercise nonlegislative functions only to the extent that their performance is reasonably incidental to the full and effective exercise of its legislative powers. Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947).

The South Carolina Constitution and various statutes refer to bills, acts, and joint resolutions of the South Carolina General Assembly; however, no constitutional or statutory provision addresses concurrent resolutions. See, e.g., S.C. Const. art. III, §18; S.C. Code Ann. §2-7-10 (1976). According to 73 Am. Jur. 2d Statutes §3,

> [w]hile some constitutions provide to the contrary, the general rule is that a joint or concurrent resolution adopted by the legislature is not a statute, does not have the force or effect of law, and cannot be used for any purpose for which an exercise of legislative power is necessary.

Pursuant to the South Carolina Constitution, a joint resolution can have the force of law. See, e.g., S.C. Const. art. III, §18.

One legal commentator has generally analyzed resolutions as follows:

> Resolutions are less formal than bills and therefore are a less authoritative expression of legislative action. Generally, resolutions are employed for the following purposes: (1) to express sentiments or opinions, (2) to carry out the inner administration of the legislative body, (3) to make temporary laws, and (4) to establish procedures for constitutional amendments.
>
> Resolutions are of three kinds: simple, concurrent, or joint. It is frequently said that the distinction between bills and resolutions is that resolutions are not law. As a generalization this is probably accurate, if by "law" one means those legislative actions which operate on all persons in society, and must be enforced by the executive department, and sustained by

> the judiciary. When it is specified, for example, that action must be taken "by law," usually a resolution will not suffice. In a limited sense, however, resolutions have the effect of "law" in that the operation of regularly enacted statutes may be conditioned or terminated by the adoption of concurrent resolutions. In Congress and some of the states, joint resolutions enacted with all the formalities of bills operate as law.

Sutherland Stat. Const. §29.01 (4th ed. 1984). According to this same commentator:

> A simple resolution is a formalized motion passed by a majority of a single legislative house. It is commonly used to create special committees, to express recognition for meritorious service, to extend sympathy on the death of a member of the house, and to express opinions to another governmental body.
>
> A simple resolution is frequently used to establish house procedure and to determine intra-legislative matters. It has limited effect as law, although for some purposes it will be judicially recognized.

Sutherland Stat. Const. §29.02 (4th ed. 1984). Describing a concurrent resolution as "merely a simple resolution which is passed by both houses of the legislature," this commentator has stated:

> Constitutional requirements for the enactment of bills do not apply to either simple or concurrent resolutions. Usually, however, concurrent resolutions are drafted in essentially the same manner as bills although they are more likely to contain preambles and are usually not submitted for three readings or to the usual committee hearings. Although a concurrent resolution speaks for the entire legislature, it has only limited legal effect and for most purposes is not law.

Sutherland Stat. Const. §29.03 (4th ed. 1984). This commentator has described joint resolutions as closely resembling statutes. Sutherland Stat. Const. §§29.04 & 29.05 (4th ed. 1984). Distinguishing between joint and concurrent resolutions, this commentator has stated:

> Although the terms "joint" and "concurrent" are frequently used synonymously such reference is inaccurate and leads to confusion. In those states which give the joint resolution the effect of law, it must be signed by the governor. This requirement is not imposed with respect to concurrent resolutions, although in some states they, too, must be submitted to the governor "for his approval." Likewise, the greater procedural safeguards and the delays intended to insure more sober judgment in the enacting of joint resolutions do not apply to concurrent resolutions. "In the current practice, concurrent resolutions have been developed as a means of expressing fact, principles, opinions and purposes of the two houses. Joint committees, adjournments and recesses of the Congress are authorized by resolutions in this form."

Sutherland Stat. Const. §29.06 (4th ed. 1984). Accord, S.C. Atty. Gen. Op., Aug. 6, 1974 ("Although a concurrent resolution, unlike a joint resolution, does not have the force and effect of law, but is, instead, an expression of the sense of the two Houses concurrently, it does, nevertheless, carry great weight.").

The plain language of the relevant 1962 concurrent resolution of the General Assembly does not indicate any intent that it have the force and effect of law. Nevertheless, that concurrent resolution does carry great weight.

The South Carolina Supreme Court has recognized the general rule that "[u]nder the American system of government the chief executive has no prerogative powers, but is confined to the exercise of those powers conferred upon him by the Constitution and Statutes." Heyward v. Long, 178 S.C. 351, 377, 183 S.E. 145, 156 (1935). Article IV of the South Carolina Constitution provides various powers, duties, and responsibilities vested

in the Governor of South Carolina. For example, article IV, §15 provides:

> The Governor shall take care that the laws be faithfully executed. To this end, the Attorney General shall assist and represent the Governor, but such power shall not be construed to authorize any action or proceeding against the General Assembly or the Supreme Court.

S.C. Const. art. IV, §15. In addition, various statutory provisions confer powers upon the Governor. See, e.g., S.C. Code Ann. §1-3-210 through §1-3-270 (1976)(appointment and removal of officers by Governor); S.C. Code Ann. §1-3-410 through §1-3-460 (1976)(maintenance of peace and order by Governor); S.C. Code Ann. §25-1-440 (1976)(additional powers and duties of Governor during declared emergencies).

According to 16 C.J.S. Constitutional Law §217:

> The determination of public policy is within the province of the legislative branch of government, and the executive branch may only apply the policy so fixed and determined, and may not itself determine matters of public policy or change the policy laid down by the legislature.
>
> It is beyond the power of executive or administrative officers or bodies to exercise, question, interfere with, or limit powers conferred on the legislature by the constitution. However, in order to rise to the level of a constitutional question, conflict between the executive and legislative branches must be clear and at least apparently incapable of resolution, absent judicial intervention.
>
> The power to make laws is a legislative power, . . . , and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the force and effect of legislation, or otherwise. Similarly, the power to alter or

> repeal laws is, . . . , a legislative power, and executive officers may not, by means of construction, rules and regulations, orders, or otherwise, extend, alter, repeal, or, ordinarily, set at naught or disregard, laws enacted by the legislature.

See also, One Hundred Second Calvary Officers Club v. Heise, 201 S.C. 68, 21 S.E.2d 400 (1942). Similarly,

> It is clear that the executive can neither encroach upon the functions of the legislature nor interfere in its duties. In general, the executive department, like the judicial, must yield in most matters to the creative power of the legislature; the legislature makes laws and the executive enforces them when made, and each department is, in the main, supreme within its own field of action. The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal, enactment, variance, or enlargement of legislation. Similarly, since the whole legislative power is assigned to the legislative department of the government, the general rule is that there exists no power in the executive department to suspend the operation of statutes....

16 Am. Jur. 2d Constitutional Law §305.

The unilateral directive suggested in your question could be exercised by the Governor only if the power is conferred upon him by the South Carolina Constitution or statutes. No constitutional or statutory provision appears to confer that power upon the Governor, as South Carolina's chief executive officer, according to the circumstances as presented in your letter.

Created and empowered by S.C. Code Ann. §1-11-10 through §1-11-400 (1976), the State Budget and Control Board ["Board"]

> is an executive body dealing primarily with the fiscal affairs of the State government and, pursuant to Code Section 1-352 [S.C.

> Code Ann. §1-11-20 (1976)], performs its functions through three divisions, to wit: the Finance Division, the Purchasing and Property Division, and the Division of Personnel Administration.[2]

State ex rel. McLeod v. Edwards, 269 S.C. 75, 78-9, 236 S.E.2d 406, 406-7 (1977). The Governor of South Carolina, an ex officio member of the Board, serves as chairman. S.C. Code Ann. §1-11-10 (1976).

Among its various powers and responsibilities,

> [t]he State Budget and Control Board shall keep, landscape, cultivate and beautify the State House and State House grounds with authority to expend such amounts as may be annually appropriated therefor. The Board shall employ all help and labor in policing, protecting and caring for the State House and State House grounds and shall have full authority over them.

S.C. Code Ann. §10-1-10 (1976).

According to 73 C.J.S. Public Administrative Law and Procedure §18:

> Generally, an administrative agency, board, or commission should act as a body, and, in the absence of a statutory exception, can act officially only in or at a lawfully convened session, if the act is one requiring deliberation or the exercise of discretion or judgment. Except where authorized by statute, the powers and duties of an administrative body may not be exercised by the individual members separately. So, the acts of individual members of the body, although constituting in numbers a majority of the body, are not in themselves equivalent

---

[2]Other divisions have been added since the Board's creation. See, e.g., S.C. Code Ann. §1-11-25(1976)[Local Government Division].

> to formal action by the body as such. However, since procedure before an administrative body is usually less formal than court procedure, it has been recognized that it is not necessary for such body to convene in formal session for every action which it takes.
>
> Notice or knowledge. Generally, no power or function intrusted to an administrative body consisting of a number of persons may be legally exercised without notice to, or knowledge of, all of the members composing such body. A rule fixing a time and place for regular meetings adopted by the body with the knowledge of all its members is sufficient to bring home notice or knowledge of regular meetings.

Thus, the Governor as Chairman of the State Budget and Control Board probably cannot make the unilateral directive suggested in your question.

In addition,

> [a]s a general rule, it is beyond the power of administrative officers or bodies to exercise, interfere with, or limit powers conferred on the legislature by the constitution. Accordingly, administrative bodies may not exercise the power to make laws, either by means of rules, regulations, or orders having the force and effect of legislation, or otherwise. Likewise, administrative officers may not supply omissions in, or enlarge the scope of, a statute, or extend, restrict, or disregard the requirements of a statute.
>
> It is beyond the power of an administrative body to change a statute by administrative interpretation, and the mandate of the provision of a statute for liberal construction of its provisions provides no authority for administrative creation of a right or liability under the guise of

> construction. An administrative officer may apply only the policy declared in the statutes with respect to the matter as to which he purports to act, and he may not set different standards or change the policy.

73 C.J.S. Public Administrative Law and Procedure §32.

As previously discussed, the General Assembly's 1962 concurrent resolution may not have the force and effect of law; nevertheless, it does carry great weight. Although §10-1-10 provides that the Board shall have "full authority" over the State House and State House grounds, the General Assembly may add to or take away from the powers and duties granted or imposed on an administrative agency. See 73 C.J.S. Public Administrative Law and Procedure §50. If the relevant 1962 concurrent resolution were determined to be a limitation upon the authority granted by §10-1-10,[3] the Board itself may lack authority to direct the Division of General Services to remove the Confederate Battle Flag. Consequently, the Governor as Chairman of the State Budget and Control Board may likewise lack authority to make the unilateral directive suggested in your question.

Again, the South Carolina General Assembly is constitutionally empowered as the legislative department of this State to make, alter, or repeal laws in its determination of public policy. S.C. Const. art. I, §8; art. III. See, also, State ex rel. McLeod v. McInnis, supra; Caldwell v. McMillan, supra; Ashmore v. Greater Greenville Sewer Dist., supra. Accord, 16 C.J.S. Constitutional Law §217.

Of course, there is no forum for the settlement of conflicts which have arisen relative to the usurpation of power by one of the three branches of government other than the courts. State ex rel. McLeod v. McInnis, supra.

---

[3]Because this question was not raised in your letter, I do not express any opinion on this issue.

CONCLUSION

The concurrent resolution passed by the General Assembly in 1962 concerning the Confederate Flag probably does not have the force and effect of law; nevertheless, it does carry great weight. The Governor, as the Chief Executive Officer of the State and Chairman of the State Budget and Control Board, is probably not empowered to unilaterally direct the Division of General Services to remove the Confederate Battle Flag. According to the South Carolina Constitution, the General Assembly is empowered as the legislative department of this State to make, alter, or repeal laws.

If I can answer any further questions, please do not hesitate to contact me.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

SLW/fg