ALAN WILSON
ATTORNEY GENERAL

October 26, 2011

The Honorable Curtis M. Loftis, Jr.
South Carolina State Treasurer
P. O. Box 11778
Columbia, South Carolina 29211

Dear Mr. Treasurer:

You have asked for our opinion on the validity of Proviso 76.14 as proposed in the Conference Committee Report concerning the 2011-2012 Appropriations Act. By way of background, in your letter dated June 27, you state the following:

> [t]his proviso ... was requested by our budget subcommittee in the House as they expressed concerns that no one was responsible for following-up on audit findings. They believed that our State may be overlooking significant revenues or cost savings because no one was accountable for such action. The subcommittee asked if we were willing to accept this task and we agreed.
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> The proviso does not exempt our agency from the requirements of § 1-7-40 by which your agency is to represent the State. In fact, we believe it would be your role to handle this part of the recovery process if that option was chosen. Furthermore, the proviso does not exempt our office from § 1-7-80 from hiring counsel without your approval. What this proviso does give our office is the additional authority to pursue potential recoveries through legal action rather than through just accounting and banking practices.

In subsequent correspondence, dated July 6, you have asked this Office to set forth in detail the legal problems, particularly regarding constitutionality, which we see with Proviso 76.14. It is your view that the Legislature possessed the power to enact the proviso because, pursuant to the Constitution, duties of constitutional officers may be "prescribed by law." See S.C. Constitution, Art. VI, § 7 (1895, as amended). You also note that the courts would likely construe the Proviso in a constitutional manner consistent with the powers and duties of the Attorney General.

Law / Analysis

The Proviso in question, Proviso 76.14, reads as follows:

> 76.14 ... The State Treasurer is directed and empowered to (a) follow up on audit finding issued by the Legislative Audit Council, the Office of State Auditor, or any other

> independent audit involving the receipt or disbursement of state funds or achieving cost savings for the State or its agencies and institutions; (b) conduct additional audits or take other actions to ensure proper receipt and disbursement of state funds in accordance with legislative intent; and (c) contract for or conduct recovery audits designed to identify overpayments or erroneous payments to vendors. *The State Treasurer may recover any amounts due the state agencies or institutions by seeking refunds, withholding future payments or distributions, or by whatever actions the State Treasurer deems appropriate including appropriate legal action on behalf of the State.* All entities disbursing or receiving state funds shall cooperate with the State Treasurer in these activities. The State Treasurer shall deposit any funds collected by this provision in a separate account to be appropriated by the General Assembly, unless otherwise provided for by law. The State Treasurer may retain and expend a portion of any funds received to pay for costs associated with the management and enforcement of this provision. The State Treasurer shall report annually to the General Assembly on its management activities and cost recoveries regarding this directive.

(emphasis added). As can be seen, Proviso 76.14 purports to bestow upon the State Treasurer the authority to "recover any amounts due the State agencies or institutions ... by whatever actions the State Treasurer deems appropriate including appropriate legal action on behalf of the State." Notwithstanding the laudable purpose of collecting monies owed the State, which we all share, the issue is, therefore, whether, *if read literally*, this portion of the Proviso would unconstitutionally intrude upon the legal authority of the Attorney General.

Our courts have repeatedly emphasized that the Attorney General of South Carolina is the State's chief legal officer with broad authority to direct and control the State's legal affairs. For example, as our Supreme Court noted in *Cooley, et al. v. South Carolina Tax Commission,* 204 S.C. 10, 28 S.E.2d 445, 450 (1943), "[t]he office of Attorney General is created by the Constitution."[1] According to the Court, the various statutes relating to the Office demonstrate the "wide scope of authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." 28 S.E.2d at 451. The Court, in *Cooley*, recognizing the creation of the Office of Attorney General by the state Constitution, as well as the broad powers of the Office, concluded that "we find the situation to be that the State of South Carolina, acting by counsel for whom provision is made in the Constitution and statutes of the State [Attorney General], with the knowledge and acquiescence of the State agency directly charged with the handling of the problem in question [Tax Commission], came to the conclusion that the best interests of the State lay in the settlement of the litigation." 28 S.E.2d at 449-450.

Furthermore, in *State ex rel. Wolfe v. Sanders*, 118 S.C. 498, 110 S.E. 808, 810 (1920), our Supreme Court recognized that the Attorney General "is the highest executive law officer of the state," who is "charged with the duty of seeing to the proper administration of the laws of the state, and his duties are quasi-judicial." Thus, the Court concluded that leave of the circuit court is unnecessary when the Attorney General brings an action for *quo warranto* to challenge the right of an officer to the office.

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[1] Art. VI, § 7 of the South Carolina Constitution provides that the Attorney General "shall be elected by the qualified voters" for a term of four years, coterminous with that of the Governor with such duties and compensation as "prescribed by law." In addition, Art. V, § 24 of the Constitution deems the Attorney General the "chief prosecuting officer of the State, possessing the authority to supervise the prosecution of all criminal cases in courts of record."

Moreover, in *State v. Peake*, 353 S.C. 499, 504, 579 S.E.2d 297, 299-300 (2003), the Court, cognizant of the Attorney General's duties as chief prosecuting officer of the State pursuant to the State Constitution, concluded that

> Petitioner would read this statute [48-1-220] to grant DHEC the authority to determine whether to pursue a criminal prosecution, while acknowledging the Attorney General's sole authority to control the process once the decision to prosecute is made. We agree with the Court of Appeals that reading this statute in this way would cause it to run afoul of S.C. Const. Art. V, § 24. This constitutional provision vests sole discretion to prosecute criminal matters in the hands of the Attorney General. In *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994), this Court held that a statue purporting to require an executive agency to refer a case before a criminal violation could be prosecuted was violative of this provision. If § 48-1-220 were read to make DHEC the gatekeeper of criminal prosecutions arising under the Act, the statute would be unconstitutional.

Importantly also, in *State ex rel.Condon v. Hodges*, 349 SC. 232, 562 S.E.2d 623 (2002), our Supreme Court addressed the question of the Attorney General's statutory and inherent common law authority as the State's chief legal officer. In *Condon*, the Court confronted the issue of the Attorney General's power to enforce the Constitution and laws of the State in the context of the improper or illegal expenditure of public funds. There, the Court stated:

> [t]he General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes when required by the Governor or either branch of the General Assembly. ... The General Assembly has also provided that the Attorney General, upon written request of a state officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986) .... The Attorney General also must give his opinion upon questions of law submitted to him by either branch "of the General Assembly or by the Governor. S.C. Code Ann § 1-7-90 (1986) .... Further,
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> > "[a]s the chief law officer of the State [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power and authority, as public interests may from time to time require, and may institute, conduct, and maintain all such proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights."*
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> *State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), *affd.* 282 U.S. 187, 51 S.Ct. 94, 75 L.Ed. 287 (1930) (citation omitted and italics added by *Daniel* Court). Cf. *State v. Beach Co.*, 271 S.C. 425, 248 S.E.2d 115 (1978) (while Attorney General has broad statutory authority, and arguably common law authority, to institute actions involving welfare of State, that authority is not unlimited).

> The Attorney General has a dual role. He is an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the State. See *Porcher v. Cappelman*, 187 S.C. 491, 198 S.E. 8 (1938) (Attorney General represents sovereign power and general public). Allowing the Attorney General to bring an action against the Governor when there is the possibility the Governor is acting illegally is consistent with the duties of this dual role. *Further, because the office of the Attorney General exists to properly ensure the administration of the laws of this State,* the Attorney General is merely ensuring that Proviso 72.109 is being administered the way in which the General Assembly intended. See *Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977) (office of attorney general exists to properly ensure administration of laws of this State).

Hodges, 349 S.C. at 238-240, 562 S.E.2d at 627-628. (emphasis added). And, in *State ex rel. McLeod v. v. McInnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982), the Court explained that

> [t]he Attorney General, by bringing this action in the name of the State, speaks for all its citizens, and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

Moreover, in *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), the Court reiterated that "[t]his Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State." The Court stressed that the Attorney General must be a party in the case to be heard regarding attorneys fees; nevertheless, *Condon v. State* emphasized the broad authority of the Attorney General to speak for the State in legal matters. See also, *State v. Cooper*, 110 S.C. 256, 96 S.E. 398 (1918) ["The history of the case satisfies us that the Attorney General would have been well within his rights to have directed the solicitor not to hand out a bill [of indictment] against the defendant. As the case stands, the anomalous spectacle is presented of one of the state's solicitors prosecuting one of the state's public servants engaged in a difficult and important charity and that servant is defended by the state's chief law officer."]; *State v. Southern Ry. Co.*, 82 S.C. 12, 62 S.E. 1116 (1908) [Court expresses concern that legislative directive to Attorney General not deny "him the power and responsibility of conducting the litigation according to his judgment."].

And, as former Attorney General McLeod noted in 1968,

> [t]he office of the Attorney General is an ancient office in this State, dating back to 1696. The Attorney General is the head of the legal department of the State of South Carolina. He supervises all litigation in which the State or any of its departments, boards, commissions, or institutions are parties. He advises all State officers, departments, agencies and institutions on legal matters. He is required to attend the sessions of the General Assembly and advise the members thereof. In addition to representing the State and its departments and agencies, he is required to represent the County Treasurers in any litigation against them. He additionally has supervisory power over the solicitors of the State.

> The foregoing is a brief summary of the general duties. A number of other powers, authorities and responsibilities rest upon the Attorney General by the common law, which is merely the decisions of various courts over the years.

Op. S.C. Atty. Gen., April 10, 1968.

More particularly, with respect to the common law authority of the office of Attorney General, the Supreme Court of Kansas, quoting 2 R.C.L. 913, summarized such authority as follows:

> "Defined generally an attorney-general is the chief law officer of a state or nation, to whom is usually intrusted not only the duty of prosecuting all suits or proceedings wherein the state is concerned, but also the task of advising the chief executive, and other administrative heads of the government in all legal matters on which they may desire his opinion .... At common law the duties of the attorney-general, as chief law officer of the realm, were very numerous and varied. He was the chief legal advisor of the crown, and was intrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the crown was interested. He alone could discontinue a criminal prosecution by entering a nolle prosequi therein .... It is generally acknowledged that the attorney-general is the proper party to determine the necessity and advisability of undertaking and prosecuting actions on the part of the state. ... As a rule the character of the duties pertaining to the office are such as call for the exercise of personal judgment based upon the facts and circumstances surrounding each particular question.

280 P. at 912. And, in 7A C.J.S. *Attorney General*, § 26, it is recognized:

> [i]n some jurisdictions, the attorney general is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specially conferred upon him or her by statute .... Statutory provisions imposing various duties and conferring various powers on the attorney general are not intended to mark the limits of his or her authority but merely to indicate specific duties and confer definite authority in each instance ... . Accordingly, a grant by statute of the same or other powers does not operate to deprive the attorney general of those belonging to the office pursuant to the common law unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not expressly conferred ... .

Further, 7 Am.Jur.2d *Attorney General* § 6 states:

> [u]nder the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority to enforce the state's statutes .... In the exercise of these common-law powers, an attorney general may not only control and manage all litigation on behalf of the state, ... but may also intervene in all suits or proceedings which are of concern to the general public.

You correctly state in your letter that Art. VI, § 7 of the South Carolina Constitution provides that the duties and compensation of constitutional officers, such as the State Treasurer, as well as the Attorney General, shall be those "prescribed by law." Thus, it appears that you argue that the General Assembly may determine, as it deems fit, that the Treasurer may be bestowed the authority by the Legislature to take whatever action he "deems appropriate" regarding the expenditure of state funds "including appropriate legal action on behalf of the State ... ." We will now address your argument.

In *State of South Carolina v. Corbin & Stone*, 16 S.C. 533 (1882), our Supreme Court addressed the powers of the Comptroller General to settle a case for the State. The Court explained that no such power existed, as follows:

> [n]ext, was the comptroller-general authorized to make the settlement relied on by the appellants as accord and satisfaction? If the comptroller had such power, it should be found in the acts creating the office and defining its duties. There are no common law powers attached to this office. On the contrary, the comptroller is a constitutional officer, having only such powers and duties as have been, or may be, provided by law .... We have not been cited to any act in which such power is expressly delegated, nor in which such duties are imposed as would by necessary implication invest him with such power. Nor have we been able to find any act of the kind. We conclude, therefore, that no such act exists.

16 S.C. at 3. In other words, lacking common law powers, the Comptroller General's authority lay exclusively in statutory law. Likewise, courts have concluded that the State Treasurer possesses no common law or inherent powers of office. Instead, it is recognized by authorities that "[t]he powers and duties of the state treasurer are generally only as specified by the state constitution and pertinent statutes." 72 Am.Jur. *States, etc.* § 63. See also, *State ex rel. Huckabee v. Hough*, 87 S.C. 436, 87 S.E. 436, 437 (1915) ["the power of appointing to office is not a prerogative, of the Governor's office]; *McDowell v. Burnett*, 92 S.C. 469, 75 S.E. 873 (1912) [power of removal or suspension from office is not an inherent function of the chief executive].

By contrast, as referenced above, our Supreme Court has now squarely held that "the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State." *Condon v. State, supra*, citing *State ex rel. Condon v. Hodges, supra*. Moreover, in *Condon v. Hodges, supra*, the Court noted that "the office of attorney general exists to properly ensure the administration of laws in this State ... ." Thus, such powers exercised by the Attorney General as the State's chief legal officer exist irrespective of statutory enactments. The question thus becomes whether the provision contained in Art. VI, § 7 of the Constitution - that the duties of the Attorney General are those "prescribed by law" - serves as a limitation upon the Attorney General's common law authority if the Legislature so prescribes. We conclude that it does not.

In *State v Williams.* 40 S.C. 373, 19 S.E. 5 (1894), our Supreme Court set forth its view regarding the construction of constitutional provisions. There, the Court referenced Cooley's Treatise on *Constitutional Limitations*, at p. 60 (2d ed.) where it was written that

> "[c]onstitutions are to be construed in the light of the common law, and the fact that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning, in order that no inroads, or as few as possible, may be made in the system of commonlaw rules, but only for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system, which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes."

19 S.E. at 6. And, in *Matheny v. City of Aiken*, 68 S.C. 163, 47 S.E. 56, 60 (1904), the Court determined that the word "law" as used in the Constitution included the common law. In the Court's opinion,

> [t]he plaintiff's property is entitled to the protection of the common and statute law and force when the first Constitution was enacted. The common and statute law is what the Constitution of 1790 and 1865 denominated the 'law of the land,' and what the Constitution of 1895 entitles 'due process of law.' *State v. Simons*, 2 Spears 644.

Generally, it is understood that the term "prescribed by law," such as used in Art. VI, § 7, refers to those duties prescribed by the Legislature. *See*, *McLavy v. Martin*, 167 So.2d 215, 221 (LA. 1964) ["The words 'prescribed by law' as contained in our own state constitution can only mean 'as prescribed by the legislature' inasmuch as there appears to be no such prescription of time and method contained in the constitution itself."]. See also, *Cathcart v. City of* Cola, 170 S.C. 362, 170 S.E. 435, 437 (1933) [action of the General Assembly]. However, decisions elsewhere conclude that such a "prescribed by law" provision, similar to that found in Art. VI, § 7, does not permit the Legislature to abolish or undermine the common law powers of the Attorney General or to diminish the inherent core functions of the Office. For example, in *State ex rel. McGraw v. Burton*, 212 W.Va. 23, 569 S.E.2d 99 (2002), the West Virginia Court of Appeals concluded that use by executive branch agencies and officials of lawyers not employed by or approved by the Attorney General constituted a diminution of the core functions of that officer. In the view of that Court,

> [w]e believe it is clear from these authorities that there are certain core functions of the Office of the Attorney General that are inherent in the office, of which the Office of Attorney General may not be deprived, and which may not be transferred to or set up in conflict with other offices. The suggestion by some of the respondents that the Legislature possesses unfettered discretion to define, delineate and limit the duties of the Attorney General is wholly at odds with the historical and well-settled understanding of the constitutional role of the Attorney General. Accordingly, we hold that pursuant to Article VII, Section 1 of the West Virginia Constitution, the Attorney General of the state of West Virginia is the State's chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to state officials and state entities.

569 S.E.2d at 107-108 (emphasis in original). Continuing, the West Virginia Court concluded:

> [w]ith the principles underlying these cases in mind, we therefore hold, pursuant to the separation of powers doctrine set forth in Article V, Section 1 of the West Virginia

> Constitution, that the Legislature cannot create offices that will conflict with or curtail the constitutional powers of the offices provided for by the Constitution; and to transfer the inherent functions of a constitutional office to another office is to curtail the former. Therefore, a legislative act that attempts to accomplish such a transfer is unconstitutional.

569 S.E.2d at 110.

Moreover, the landmark case of *Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915) is instructive here. In *Fergus*, the Illinois Supreme Court addressed the issue of the meaning of the language "prescribed by law" as used in the Illinois Constitution. There, the Court examined the history of the Office of Attorney General in considerable detail, explaining as follows:

> [i]t will be observed that the Constitution confers no express powers upon the Attorney General and prescribes no express duties for him to perform. It simply provides that he shall perform such duties as may be prescribed by law. The office of the Attorney General was one known to the common law, and under the common law the Attorney General had well-known and well-defined powers, and it was incumbent upon him to perform well-known and clearly prescribed duties. It is not necessary, and indeed it would be difficult, to enumerate all the powers vested in the Attorney General at common law and all the duties which were imposed upon him to perform. It is sufficient for the purposes of the discussion of the point here involved to state that at common law the Attorney General was the law officer of the crown and its chief representative in the courts.

270 Ill. at 336.

The question presented, explained the Court, was as follows:

> [t]he Constitution provides, as has been noted, that the Attorney General shall perform such duties as may be prescribed by law. The common law is as much a part of the law of this state, where it has not been expressly abrogated by statute, as the statutes, and is included within the meaning of this phrase. The question presented for our determination is whether, by creating this office under its well-known common-law designation, the Constitution ingrafted upon it all the powers and duties of the Attorney General as known at common law, and gave the General Assembly authority to confer and impose upon the Attorney General only such additional powers and duties as it should see fit.

Id. at 337. In the Court's opinion, while "[i]t is true that there were other representatives of the crown in the courts at common law, they were all subordinate to the Attorney General." Moreover,

> [b]y our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our Constitution the Attorney General is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real

> party in interest, except where the Constitution or a constitutional statute may provide otherwise.

Id. at 342.

In addition, the Illinois Supreme Court in *Lyons v. Ryan*, 780 N.E.2d 1098 (Ill. 2002) concluded that a statute which purported to confer standing upon private citizens to sue in cases where the State was the real party in interest was unconstitutional. In the Court's view,

> [a]s the chief legal officer of the state, the Attorney General's authority is derived from the Illinois Constitution ... . The duties of the Attorney General are prescribed by law and include those powers traditionally held at common law ... . Only the Attorney General is empowered to represent the state in litigation where the state is the real party in interest ... . The legislature may add to the powers of the Attorney General, but it cannot reduce the Attorney General's common law authority in directing the legal affairs of the state ... . Thus, legislation that improperly usurps the common law powers of the Attorney General is invalid ... .
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> Here, although well-intentioned, the legislature has improperly reduced the Attorney General's common law authority by enacting section 20-104(b) to confer standing upon private citizens to commence and prosecute actions on behalf of the state. Section 20-104(b) improperly usurps the powers of the Attorney General and is invalid.

780 N.E.2d at 1105-1106.

Other decisions are in accord. See, *Gust K. Newberg, In. v. Ill. State Toll Highway Authority*, 456 N.E.2d 50, 67 (Ill. 1983) [Attorney General's "duties are prescribed by law and also include those powers traditionally held by the Attorney General at common law. While the legislature may add to his powers, it cannot reduce the Attorney General's common law authority in directing the legal affairs of the State," citing numerous decisions.]; *State of North Dakota v. Hagerty*, 580 N.W.2d 139, 146-147 (1998) ["By providing in the North Dakota Constitution for the election of certain officers, 'the framers of the Constitution ... reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided.' .... [T]he legislature has no constitutional power to abridge the inherent powers of the attorney general despite the fact that the constitution provides that 'the duties of the ... attorney general ... shall be as prescribed by law.'"]; *Murphy v. Yates*, 348 A.2d 837, 846 (Md. 1975). ["If an office is created by the Constitution, and specific powers are granted or duties imposed by the Constitution, although additional powers may be granted by statute, the position can neither be abolished by statute nor reduced to impotence by the transfer of duties characteristic of the office to another office created by the legislature. ... We regard this as but another facet of the principle of separation of powers ...."]; *State of Miss. ex rel. Patterson v. Warren*, 180 So.2d 293, 307 (Miss. 1965) ["At common law, the duties of the attorney general, as chief law officer of a realm, were numerous and varied. He was chief legal advisor of the crown, was entrusted with the management of all legal affairs, and prosecution of all suits, criminal and civil in which the crown was interested. He had authority to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state and to intervene in all actions which were of concern to the general public."]; *Hancock v. Ennis*, 195 S.W.2d 151, 153

(Tex. 1946) [Powers conferred upon Attorney General and county attorneys under Constitution "'are exclusive. The Legislature cannot devolve them upon others.'" [quoting *Maud v. Terrell*, 200 S.W. 375, 376); *State v. Sebelius*, 179 P.3d 366, 377 (Kan. 2008) ["the legislature, like the governor, lacks constitutional authority to intrude into the attorney general's duties as an officer of the court."].

Thus, in our opinion, the fact that a constitutional officer possesses common law or inherent authority at the time the Constitution was framed makes a significant difference with respect to the interpretation of "prescribed by law" as used in Art. VI, § 7. We note that our Supreme Court has made clear that the General Assembly "... does not have ... control of a constitutional office as to abolish, vary its term, prescribe a different mode of filling such office, remove or suspend the office holder unless authority for such action is found in the Constitution."

As discussed above, and in contrast to other constitutional officers, the Attorney General of South Carolina possesses broad common law powers as recognized by our Supreme Court in *Condon v. Hodges* and *Condon v. State*. Moreover, in *Condon v. Hodges, supra and Langford v. McLeod, supra,* the Court concluded that "the office of attorney general *exists* to properly ensure the administration of laws of this State ...." *Condon v. Hodges,* 349 S.C. at 240, 562 S.E.2d at 627-628, citing *Langford v. McLeod, supra.* This being the case, we are of the opinion that our courts would construe Art. VI, § 7 in light of the common law and inherent powers of the Attorney General. Thus, we believe our courts would conclude, as the Supreme Court of Illinois did in *Fergus v. Russell, supra*, that "by creating this office under its well-known common law designations, the Constitution ingrafted upon it [the office of Attorney General] all the powers and duties of the Attorney General as known at common law, and gave the General Assembly authority to confer and impose upon the Attorney General only such additional powers and duties as it should see fit." Moreover, as held by the West Virginia Court of Appeals in *McGraw, supra*, "the Legislature cannot ... transfer the inherent function of a constitutional office to another office ... to curtail the former." 569 S.E.2d at 107.

Furthermore, the history of the constitutional provision relating to the Attorney General is also instructive. Art. VI, § 7 dates back to the 1868 Constitution, at least with respect to the Attorney General. Art. IV, § 28 of the 1868 Constitution provided as follows:

> [t]here shall be an Attorney General for the State who shall perform such duties as may be *prescribed by law*. He shall be elected by the qualified electors of the State for the term of four years and shall receive for his services such compensation as shall be fixed by law.

(Emphasis added). It is clear that the framers of the 1868 Constitution recognized the common law powers of the Attorney General. In the debates at the 1868 Constitutional Convention regarding the creation of the office of Attorney General, and whether the term therefor should be two or four years, the following exchange occurred among the delegates:

> Mr. F. J. Moses, Jr. moved to strike out the word "two" in third line and to insert the word "four" so as to fix the term of office at four years.
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> Mr. R. C. .DeLarge. The term of Governor has been fixed at two years, and I trust that the Attorney General will be the same. I propose two instead of four.

> Mr. F. J. Moses, Jr. It certainly seems to me that the term of Attorney-General should be for four years. The office of Attorney General is not connected in any manner with that of the Governor. It may, with some reason, be said that the term of the Adjutant-General as he is a salaried officer under the Governor; but the Attorney General is an officer of the Court, the chief prosecuting officer of the State, and should, at least hold his office as long as the Judges.
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> Mr. J. M. Rutland. I regard the term of four years as short enough for the Attorney-General to become familiar with the duties of his office. It requires much practical experience to discharge the duties of that office in a proper manner. It is somewhat analogous to the office of Judge, and the Judges are to be elected for six years. The Attorney General is the adviser of the State of South Carolina, and the adviser of all the important officers of the State. It is necessary, first, to become acquainted with the routine of the office, which I will venture to say even the ablest lawyer can scarcely accomplish in less than two years. I would fix his term the same as that of the Judges, but I am willing to support the term of four years. I believe that it is necessary to fix that period to render his services valuable to the State. These officers were intended to serve the State of South Carolina. I am satisfied no man can be qualified at the end of the half term proposed.
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> The question was then taken on the motion to strike out "two" and insert "four" which was agreed to.

Proceedings of the Constitutional Convention of South Carolina (1868), 647.

Contemporaneously with adoption of the 1868 Constitution, the General Assembly enacted Act No. 42 of 1868, "An Act to Fix the Salary and Define the Duties the Attorney General of the State." Many of the statutes which are now codified in Title 1, Chapter 7, and which relate to the powers and authority of the Attorney General are contained in this 1868 Act. In describing these various statutory provisions, our Supreme Court in *State ex rel. Condon v. Hodges*, stated that "the General Assembly has *elaborated* on the Attorney General's duties in several statutes." 562 S.E.2d at 627. (emphasis added). In view of the fact that in *Condon v. Hodges* and subsequently in *Condon v. State*, the Court made it clear that the Attorney General possesses "broad" common law authority, the Court's use of the word "elaborated" is indeed telling, and is further indication that such powers remain fixed as part of the "inherent" functions of the Attorney General. As the Court explained in *Condon v. Hodges*, "the office of Attorney General exists to properly ensure the administration of the laws in this State ... ." *Id.* at 627-628.

While the term of the Attorney General was shortened to two years in the Constitution adopted in 1895, the "prescribed by law" language remained precisely the same as that contained in the 1868 Constitution. Section 29 of Article V of the 1895 Constitution provided that "[t]here shall be an Attorney General for the State, who shall perform such duties as may be "prescribed by law." Although the Attorney General provision in today's Constitution is found in Art. VI, § 7, the "prescribed by law"

language is identical.[2] Thus, in our view, the 1868 debates regarding the office of Attorney General referenced above, remain enlightening. Such debates provide strong evidence that the common law powers of the Attorney General were intended by the framers to permanently remain part of the underpinning of this constitutional office.

In addition, as noted above, Art. V, § 24 expressly provides that the Attorney General is "the chief prosecuting officer of the State, possessing the authority to prosecute all criminal cases in courts of record." While this provision is usually thought of as relating only to the "prosecution" of criminal cases and the duties attending thereto, *State v. Peake*, 345 S.C. 72, 545 S.E.2d 840 (S.C. App. 2001); we do not believe the words "chief prosecuting officer of the state" are so limited. The word "prosecute" possesses a broad meaning. As one court has stated,

> [t]he Standard Dictionary defines 'prosecute': 'To bring suit against in a court, for redress of wrong or punishment of a crime; to carry on a judicial proceeding against, as to prosecute a criminal; to seek to enforce or obtain as a claim or right, by legal process; to begin and carry on a legal proceeding.' Webster defines 'prosecute': 'To seek to obtain by legal process; the instituting and carrying on of a suit in a court of law or equity.'

Western Elec. Co. v. Pickett, 118 P. 988, 990 (Colo. 1911). Moreover, as our Supreme Court has recognized, "an action will lie for the malicious prosecution of 'either civil or criminal' proceedings." *Cisson v. Pickens Savings and Loan Assn.*, 258 S.C. 37, 42, 186 S.E.2d 822, 824 (1972). Thus, the word "'prosecute'" applies to either a civil or criminal action." *City of Westwood v. Holland*, 394 P.2d 56, 58 (Kan. 1964).

Further, a number of authorities strongly reinforce the principle that Art. V, § 24, designating the Attorney General as the 'chief prosecuting officer of the State," as including all the powers of the State's chief legal officer. *See*, *State ex rel. Dist. Atty. v. Eaddy*, 151 So.2d 917 (Miss. 1963) [chief prosecuting officer possesses authority to abate public nuisances]; *State ex rel. Downing v. Powers*, 180 N.E. 647, 648 (Ohio 1932) ["The petition is directed to alleged violations of law in Hancock County, and the prosecuting attorney, as the chief prosecuting officer, charged with the duties of enforcing the laws in that county, may properly take notice of alleged violations, and if there is any dereliction of duty on the part of the respondent ... no one is more interested in invoking the discharge of respondent's duties in that county than the prosecuting attorneys."]. *State v. Corbin & Stone*, 16 S.C., *supra* at 537 ["this gave Attorney-General Melton full authority to act in the original suit, and we think the act is wide enough to vindicate the action of Attorney-General Conner in instituting this suit and Attorney-General Youmans in prosecuting it."] (emphasis added). Indeed, the General Assembly has, in various statutes, repeatedly referred to the duties of the Attorney General as including the "prosecution" of both civil and criminal cases. See, e.g. § 1-7-100(2) [Attorney General shall be "present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such *prosecution* or suit."]; § 1-7-50 [duty of Attorney General to defend prosecution of "any action, civil or criminal" of public officers and employees when such acts or omissions of officer is performed in good

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[2] Of course, the original 1895 Art. V, § 29 ultimately became part of Art. VI, § 7. The term of the Attorney General, like other constitutional officers is now four years. Nevertheless, the powers and duties of the Attorney General, which were recognized at common law and thereby incorporated into the South Carolina Constitution remain the same.

faith]. § 1-7-320 ["Solicitors shall perform the duty of the Attorney General and give their counsel and advice to the Governor and other State officers, in matters of public concern, whenever they shall be, by them required to do so; and they shall assist the Attorney General, or each other, in all *suits of prosecution* in behalf of this State when directed so to do by the Governor or called upon by the Attorney General."]. (emphasis added).

State ex rel. McLeod v. Snipes, 266 S.C. 415, 223 S.E.2d 853 (1976) is particularly instructive. There, our Supreme Court placed the term "prosecuting officer," as used in Art V, § 24, in its proper historical context. The Court was required in *Snipes* to determine whether a statute (then Section 1-234 of the 1962 Code, now § 1-7-50), requiring the Attorney General to defend public officers who were subject to criminal prosecution, was in conflict with Art. V, § 24 (then Art. V, § 20) which designated the Attorney General the "chief prosecuting officer of the State." In finding that the statute did not irreconcilably conflict with the Constitution, the Court delved into the history of the office of the Attorney General in South Carolina. The Court's reasoning was as follows:

> By way of background, Section 1-234 was enacted in 1960 and Article 5, Section 20, was ratified in 1973. While this constitutional provision designated the Attorney General as the chief prosecuting officer for the first time, it represented no practical change in the situation of the Attorney General from that which existed prior to the adoption of this provision of the Constitution in 1973. For, prior to 1973, Code Section 1-237, enacted in 1868, provided for the participation of the Attorney General in prosecutions in the following language:
>
> 'The Attorney General shall consult with and advise the solicitors in matters relating to the duties of their offices. When, in his judgment, the interest of the State requires it he shall:
>
> (1) Assist the solicitors by attending the grand jury in the examination of any case in which the party accused is charged with a capital offense; and
>
> (2) Be present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such prosecution or suit.'
>
> It is apparent, therefore, that the present situation was not created by the adoption of Article 5, Section 20, in 1973; but rather the constitutional designation of the Attorney General as the chief prosecuting officer for the first time brought the matter to public attention.

266 S.C. at 419, 223 S.E.2d at 854-855.

Thus, the *Snipes* Court concluded that adoption of the constitutional provision designating the Attorney General the "chief prosecuting officer of the State" actually was simply an incorporation of the Attorney General's powers existing at least since 1868. Even more significantly, the Court recognized that the term "prosecution" included the duties set forth in the 1868 statute (§ 1-237 of the 1962 Code, now § 1-7-100, 1976 Code as amended) which included the duty of controlling the State's litigation.

Thus, present day Art V, § 24 has been construed by the Court as incorporating the duties of the Attorney General regarding the conduct of the State's litigation, civil as well as criminal. Accordingly, the Attorney General is the State's "chief prosecuting officer," meaning he controls *all of the State's litigation*. Art. V, § 24 is thus in reality, a codification of the common law powers of the Attorney General.

Important also is that the Attorney General's common law authority as chief prosecuting officer of the State bestowed upon that officer all powers attendant thereto not only with respect to criminal prosecutions, but the initiation of civil litigation as well. Numerous courts have recognized that at common law the Attorney General was "the chief legal advisor of the crown, and was entrusted with the management of all legal affairs and the *prosecution* of all suits, *civil or criminal* in which the crown was interested ...; he had power to control and manage all litigation on behalf of the state ... and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order and protection of public rights." *Kennsington-Saenger Theatres, Inc. v. State*, 18 So.2d 483, 486 (Miss. 1944) (emphasis added). See also, *e.g., State ex rel. Williams v. Karston*, 187 S.W.2d 327, 329 (Ark. 1945); *State Health Planning and Coordinating Council v. Hyland*, 391 A.2d 1247, 1251 (N.J. 1978).

Our Supreme Court has emphasized that legislative infringement upon the inherent powers and duties of a constitutional office is a violation of the separation of powers provision of the state Constitution. In *Williams v. Bordon's Inc.* the Court addressed the constitutionality of Section 2-1-150 of the Code 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." 274 S.C. at 279. 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, lower-legislators may be exempt from court appearances, is unconstitutional as violative of the principle of separation of powers.

Id. at 280.

Courts have recognized the overarching importance of the inherent power of the Attorney General to represent the State in all legal proceedings involving the State, its agencies and its officers. *State ex rel. Condon v. Hodges, supra* emphasized, for example, the importance of § 1-7-40 of the Code which states that the Attorney General must

> appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal when required by the Governor of either branch of the General Assembly.

In addition, we note that § 1-7-80 states in pertinent part that

> The annual appropriation for the Attorney General for the expenses of litigation is subject to the following conditions:
>
> (1) the Attorney General shall conduct all litigation which may be necessary for any department of the state government or any of the boards connected therewith, and all these boards or departments are forbidden to employ any counsel for any purpose except through the Attorney General and upon his advice.

And, as we have seen, the Court in *State ex rel. McLeod v. Snipes, supra* relied upon § 1-7-100, which provides in pertinent part that the Attorney General shall

> (2) Be present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such prosecution or suit.

Further, as we emphasized earlier, *Condon v. Hodges, supra* quotes with approval *State ex rel. Daniel v. Broad River Power Co., supra,* which recognized that the Attorney General "may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights."

The authority of the Attorney General to "conduct" the State's litigation may be employed by different means and through various ways. In *Condon v. Hodges* the Attorney General brought an action on behalf of the citizens of the State, contesting the authority of the Governor, Treasurer and Comptroller General to devote public funds to purposes other than as authorized by the Legislature. The Court quoted with approval *State ex rel. McLeod v. McInnis, supra*, emphasizing that "the Attorney General, by bringing this action in the name of the State, speakers for all its citizens ... ." In addition, the Attorney General may also appear as the attorney for the State or agency in an action or may simply appear as attorney of record on the pleadings even though other counsel are appearing and acting for the state entity as well. See, 7 Am. Jur. 2d, *Attorney General,* § 17. Of course, the Attorney General may intervene in an action. *Sloan v. S.C. Bd. of Physical Therapy*, 370 S.C. 452, 636 S.E.2d 598 (2006). Furthermore, it is well recognized that the common law power of the Attorney General authorizes that officer to enter "into contingency fee arrangements or agreements with private counsel under the direction and control of the Attorney General. See, *State ex rel. Nixon v. American Tobacco Co.,* 34 S.W.3d 122 (Mo. 2001). In other words, the Attorney General's authority to "conduct" the State's litigation is meant in the broadest sense of the word – i.e., oversight and control; *State v. Lead Industries Assn., Inc.*, 951 A.2d 428, 475 (R.I.2008) ["there is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain *non-criminal* ... matters." (emphasis added).

Such oversight and control, reflected by example, in § 1-7-100, may arise at any stage of the litigation. For example, in *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956), a case involving a charitable trust, the Attorney General was permitted by the Supreme Court to intervene on appeal "for the purpose of protecting the interest of the public in the charitable trust ...." The Court noted that the Attorney General had not been made a party in the circuit court proceedings nor otherwise made aware until shortly before his application to the Court to intervene.

And, in *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977), the Court upheld the right of the Attorney General to prosecute an appeal over the affected agency's objection. As the Court concluded,

> [t]he authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concomitant effect of creating a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship .... [t]he Attorney General is empowered, when he appears for State officers, to decide matters of legal policy which would normally be reserved to the client in an ordinary attorney-client relationship ... Where, in his judgment, an appeal would further the interests of the Commonwealth and the public he represents, the Attorney General may prosecute an appeal to the Supreme Court of the United States from a judgment of the District Court over the expressed objections of the State officers he represents.

366 N.E.2d at 1266-67.

Moreover, in *Cooley, supra*, our Supreme Court rejected the efforts of two of the three members of the Tax Commission to disapprove the settlement by the Attorney General of a suit brought against the Tax Commission and the Attorney General. It was argued to the Court that "the Attorney General has not the power to make a settlement of such nature where a majority of the members of the South Carolina Tax Commission do not approve, but on the contrary, oppose the same." 28 S.E.2d at 449. The Court, in view of the assessment by the Attorney General of the lack of strength of the State's case, concluded:

> [h]aving reached this conclusion, and finding that notwithstanding the same, he was able to obtain the sum of $400,000 for the State, he undertook to enter into a settlement agreement which in the light of the petitioners' contentions involve no element of criticism except the view that since the Attorney General is not satisfied that the State can recover the full amount of taxes that would be collectible if the questions in issue were decided in favor of the state, he is not possessed of power to make a settlement to bring into the coffers of the state this sum obtainable by it. This contention we reject.

Id.

Turning now to the Proviso in question, we are of the opinion that, if enacted into law, such Proviso would be constitutionally suspect. The Proviso states that the State Treasurer "may recover any amounts due ... by whatever actions the State Treasurer deems appropriate including appropriate legal action on behalf of the State." It is urged that the Proviso was not intended to undermine the authority of the Attorney General as chief legal officer; and that such Proviso merely authorizes legal actions to be brought on behalf of the State for the recovery of funds with the approval of the Attorney General. However, the words of the Proviso belie such an interpretation. The Attorney General is not mentioned in the Proviso. Moreover, such Proviso clearly leaves it within the discretion of the State Treasurer [as he "deems appropriate"] to initiate "the appropriate legal action on behalf of the State." Just as in *Williams v. Borden's, Inc.*, where the Court determined that the Legislature's assumption of powers belonging to another branch of government violated the separation of powers provision of the Constitution, here the

Legislature has assumed to itself the management and control of the State's litigation which is constitutionally bestowed by virtue of the common law and inherent powers upon the Attorney General. Thus, while a court would make every effort to construe the Proviso in a constitutional manner, see *State v. 192 Video Game* Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), such proviso would likely violate the separation of powers requirement of Art. I, § 8, as well as Art. VI, §.7 and Art. V, § 24.

Conclusion

The purpose of the Proviso in question is certainly laudable. Collection of monies owed the State for the protection of the taxpayers is indeed a beneficial purpose and the State Treasurer, accountable to the people and taxpayers, certainly is correct in seeking to ensure that full accountability to the taxpayers is achieved. However, we believe a court may well conclude that, if enacted in its current form, the Proviso violates the constitutionally protected, inherent powers of the Attorney General. As the State's chief legal officer, who is required under the common law, statutes and the Constitution to control the State's litigation and legal affairs, the authority of the Attorney General is undermined by the Proviso which would allow the State Treasurer to determine, in his discretion, whether to bring certain actions on behalf of the State. In our opinion the Proviso is thus constitutionally suspect.

Of course, if the Proviso were to be enacted, like any other act of the General Assembly, it would be presumed valid and constitutional. A legislative act will not be declared void by the courts 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). Every doubt regarding the constitutionality of an act of the General Assembly is resolved in favor of the statute's constitutional validity. Importantly, only a court, not this Office, may strike down an act of the General Assembly as unconstitutional; while the Attorney General may, in his opinion, comment upon what is deemed an apparent unconstitutionality, he may not declare the act void. In other words, a statute, duly enacted "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

Notwithstanding the presumption of constitutionality which must be given the Proviso, and the duty of the courts to construe a statute in a constitutional manner, the Proviso, if enacted, would be constitutionally suspect. It is our opinion that a court would, for all the reasons set forth above, likely conclude that the Proviso is unconstitutional.

Sincerely,

Robert D. Cook
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RDC/an