



HENRY McMASTER
ATTORNEY GENERAL

March 31, 2009

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate of South Carolina
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have asked several questions concerning the American Recovery and Reinvestment Act of 2009 (ARRA), commonly known as the federal “stimulus” legislation. You wish to know the ramifications under federal and state law of the General Assembly’s acceptance by concurrent resolution and subsequent appropriation of the federal funds authorized by Congress as part of the stimulus legislation. Certain of these funds may, pursuant to various provisions of the Act, remain under the direction and control of the Governor, who publicly opposes the use of these funds for anything other than debt reduction in South Carolina. Yet, you note, one provision of the Act may possibly be so interpreted to remove the Governor entirely from the process of applying for and administering these funds. You are concerned that the Governor’s unwillingness to accept these funds for the purpose designated by Congress – job creation and economic recovery – may thus place such funds in jeopardy or legal peril or that the funds may go unused for the purpose for which Congress provided them.

More specifically, by way of background, your letter states:

I am specifically interested in the portion of the Act that provides for acceptance of stimulus funding by a state legislature in the event a governor might decide not to accept those funds and whether acceptance, use and administration of those funds would require further action and participation by the governor and executive branch of state government or whether legislative action is sufficient to obtain funds even without the applications and certifications required elsewhere in the Act.

The Act specifies in pertinent part that “if funds provided to any state in any division of this Act are not accepted for use by the Governor, the acceptance by the State Legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.” My question concerns the subsequent

machinations, reporting, administrative support and procedures required if acceptance of funding is accomplished by the action of a legislature contrary to the governor's discretionary wishes.

The issue that concerns me is as follows: If a state passes a concurrent resolution to accept funding, does that acceptance satisfy the certification requirement provided in § 1607(a) and elsewhere in the Act or is the Governor still required to make a certification that the funds will be used in the manner prescribed in the Act.

Also, there are many other provisions in the Act where the Governor is required to make application for specific federal funding. Therefore, where a Governor has declined to accept the federal funds as provided in the Act, does the action of a state legislature by concurrent resolution in overriding his decision obviate any further gubernatorial action in applying for and receiving the federal funds as provided in the Act? Specifically, my concern is that a State may not be empowered to compel a Governor to participate when federal law makes that decision discretionary and when the participation of his office is needed to monitor and administer the use of the funds.

I would appreciate your interpretation as to whether acceptance by a State Legislature of federal funding as provided in § 1607(b) allows the federal government to provide funding to the state in accordance with the concurrent resolution of whether the Act still requires application and certification by a Governor before funds can be properly obtained and used.

If those certifications and applications are still required to be done by the Governor, my second question is whether the General Assembly has the power under our state constitution and the laws of South Carolina to mandate a Governor make the necessary certifications and applications necessary to ensure that South Carolina receives its share of the federal stimulus money. The issue seems to be can the state require Governor Sanford do something that federal law has given him discretion over doing or even if our constitution permits us to do so.

Finally, I would ask could a legal action that challenges the General Assembly's attempt to accept the stimulus money by requiring the Governor to make applications and certifications or that questions whether the money can be obtained absent the Governor's action because of the provisions of the federal law have a potential result of those funds being enjoined while the case is litigated. As you are aware, an enjoinder of the federal stimulus dollars after our budget is written would be disastrous.

Law / Analysis

The American Recovery and Reinvestment Act of 2009 (ARRA), PL 111-5, was recently enacted by the Congress and signed into law by the President. The Act's purposes are summarized in Section 3 thereof, as follows:

- (1) To preserve and create jobs and to promote economic recovery.
- (2) To assist those most impacted by the recession.
- (3) To provide investments needed and to increase economic efficiency by spurring technological advances in science and health.
- (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
- (5) To stabilize State and local government budgets in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

As we understand it, South Carolina's share of federal stimulus monies amounts to approximately 8 billion dollars, including 2.5 billion in tax cuts. The majority of these funds flow directly to South Carolina agencies for various purposes. Governor Sanford's letter to President Obama, dated March 10, 2009, describes these funds and their breakdown as follows:

... approximately 75 per cent of the stimulus money is directed by federal statute to flow through programmatically to our state. Our administration is not able to redirect, or otherwise impact those funds. As our hands are tied in that regard, and while I find the restrictions of these funds' use highly regrettable, it is my hope that those funds are directed in the manner best able to promote job creation in our state.

The Governor's letter to the President continues:

The governors of the nation have been granted discretion over the remaining 25 per cent of the stimulus funds, some \$700 million in the case of South Carolina. As I see my duty to current and future generations of South Carolinians, for the reasons outlined above, I believe a blanket acceptance of the funds would be unwise. However, our taxpayers will still be required to pay for this federal spending in other states, so I therefore also think a blanket rejection of the funds would be unwise.

To that end, I have decided to send the President a letter asking for a waiver from spending money we don't have [W]e will ask to allocate the money for

which our administration has discretion to paying down our very sizable debt and contingent liabilities.

The President, through his Budget Director, Peter Orszag, rejected the Governor's request for a waiver on two separate occasions. In his second letter of rejection, Director Orszag addressed the purposes of the State Fiscal Stabilization Fund, which distributes the \$700 million to South Carolina and places those funds under the Governor's direction. His letter stated:

You [Governor Sanford] have proposed using the Stabilization Fund moneys for 'paying down (your) State's sizable debt. However, the (recovery) Act does not authorize the Department of Education to award Stabilization Fund money to a state for that purpose

Although payment of public debt obligations is a necessary governmental expenditure, the Department of Education in consultation with the Department of Justice and my office, has concluded that the paying down of past debt does not constitute use of federal funds for 'government services' under the plain meaning of those words in the Act.

Director Orszag's most recent response is consistent with his earlier letter to Governor Sanford, dated March 16, 2009. There, the Director advised that the State Fiscal Stabilization Fund must be used as follows:

- 81.8 per cent 'for the support of elementary, secondary and post-secondary education and, as applicable, early childhood education programs and services.' (ARRA § 14002(a)(1)).
- 18.2 per cent "for public safety and other government services, which may include assistance for elementary and secondary education, and for modernization, renovations, or repair of public school facilities and institutions of higher education facilities, including modernization, renovations, and repairs that are consistent with a recognized green building system." (ARRA § 14002(b)(1)).

We turn now to your specific questions. You first ask about Section 1607 of ARRA. That Section provides as follows:

- (a) Certification by Governor – Not later than 45 days after the date of enactment of this Act, for funds provided to any state or agency thereof, the Governor of the State shall certify that: (1) the State *will request and use funds provided by this Act*; and (2) the funds will be used to create jobs and promote economic growth.

- (b) Acceptance by State Legislature – If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of adoption of a concurrent resolution, shall be sufficient to provide funding to such State.
- (c) Distribution – After the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of governments, public entities, and public private entities within the State either by formula or at the State’s discretion.

Your question with regard to § 1607 is “whether acceptance by a State Legislature of federal funding as provided in § 1607(b) allows the federal government to provide funding to the State in accordance with the concurrent resolution or whether the Act still requires application and certification by a Governor before funds can be property obtained and used.”

Of course, when construing ARRA, a court must consider provisions of the Act not in isolation, but together as a harmonious whole. As the Supreme Court stated in *Richards v. United States*, 369 U.S. 1, 11 (1962), “a section of a statute should not be read in isolation from the context of the whole.” And, as observed in *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974):

“[w]hen ‘interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law, as indicated by its various, and give to it such a construction as will carry into execution the will of the Legislature.’”

Certain State Fiscal Stabilization funding is addressed in Section 14005(a) and (b) of ARRA. Pursuant to those provisions, “the Governor of a state desiring to receive an allocation under Section 14001 shall submit an application at such time, in such manner, and containing such information as the Secretary [of Education] may reasonably require.” Subsection (b) sets forth the requirements for an application by the Governor for funding as follows:

- (b) Application – In such application, the Governor shall –
 - (1) include the assurance described in subsection (d);
 - (2) provide baseline data that demonstrates the State’s current status in each of the areas described in such assurances; and
 - (3) describe how the State intends to use its allocation, including whether the State will use such allocation to meet maintenance of effort requirements under the ESEA and IDEA and in such cases, what amount will be used to meet such requirements.

Subsection (d) requires the application under subsection (b) to include certain assurances such as maintenance of state effort, maintenance of support for higher education and the taking of actions to improve teacher effectiveness.

Pursuant to § 14001(c), the Secretary of Education is authorized to distribute “State Incentive Grants” to the states. Again, the Governor of a state is required to apply for such grants and must demonstrate the State’s progress in meeting federal criteria.

It is our understanding that, pursuant to certain provisions in the Act, local authorities may apply for certain federal funds. For example, the Secretary of Education is permitted to reserve up to \$650,000 for an Innovation Fund to be used for academic achievement awards. *See*, § 14007.

In our view, it would have been futile for Congress to insert these various provisions, requiring the Governor or local officials to make application to federal authorities for receipt of funds by the State if such provisions could be bypassed simply by the adoption of a concurrent resolution by the state Legislature. Such a conclusion would, in effect, nullify the various criteria which Congress has established for a State to receive federal funds under the Act. It must thus be presumed that Congress did not intend to impliedly repeal much of ARRA by the insertion of § 1607(b) in the same Act. *See, Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29 (D. C. Minn. 1944). And, as has been stated, “[t]he presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time.” *U.S. ex rel. I. G. Farbenindustrie Aktiengesellschaft v. Burnett*, 65 F.2d 195, 196 (D. C. Cir. 1933). Thus, a court would likely construe the statute as a whole, rather than focusing solely upon § 1607(b).

We are aware of no court decision or interpretation by a state Attorney General of § 1607’s impact upon the remainder of ARRA. The Act, having been enacted so recently, has, to our knowledge, not yet been subject to judicial construction. However, the Congressional Research Service, an independent arm of Congress, has formally attempted to reconcile these various provisions of the Act. The Memorandum, prepared by CRS, notes that

Section 1607 may be a congressional response to statements by several state governors who indicated a disinclination to have entities in their State seek and receive funds provided under the Recovery Act The Act requires that, in order to be eligible for such funds, a governor must first either certify that such funds will be requested, or, if that does not occur, then a state legislature may fulfill the same condition by passing a concurrent resolution (which does not generally require a governor’s signature

Further, the CRS Memorandum observed that the language of § 1607 is “ambiguous” and could be read in such a way such that a concurrent resolution has the effect of bypassing the Governor or other officials altogether in the process of applying for and receiving the federal funding authorized by

ARRA. Specifically, the CRS Memorandum noted that, on its face, § 1607(b)'s language, "acceptance ... shall be sufficient to provide funding" could be interpreted as controlling. The result of this interpretation would be that the concurrent resolution adopted by a state legislature is all that is necessary to receive federal Stabilization Fund funding.

Notwithstanding this possible interpretation, however, the CRS Memorandum concluded as follows:

[a] more likely interpretation of this language is that an "acceptance ... [which] shall be sufficient to provide funding" would only trigger the authority of federal agencies to grant federal funds, but would not otherwise reallocate power within the state. Under this interpretation, "acceptance" by a state legislature by concurrent resolution under § 1607(b) is merely the functional equivalent of the "certification" that can be made by a governor under § 1607(a). Either of these actions would appear to be nothing more than preliminary conditions which must be met before a state became eligible to apply for and receive federal funds under the Recovery Act. In effect, § 1607(a) gives a governor the opportunity to exercise a veto over receipt of federal funding under the Act by failing to make such certification within 45 days, but then § 1607(b) gives the state legislature the opportunity to act to negate the effect of this veto.

Memorandum at 3.

Finally, the CRS *Memorandum* found that any broad construction of § 1607, which gives a state legislature the power to remove a governor completely from the application and administration process in receiving federal funding "would likely raise Tenth Amendment issues" as a significant reallocation of state powers "between a state legislature and a state executive branch." Accordingly, in the view of the CRS, "once either a governor's certification or the legislature's acceptance has been made, § 1607 would have little or no apparent effect on the power of a governor, state or local official to choose whether or not to seek and administer these funds." In CRS's view,

[t]he language of § 1607(b), while adding an additional requirement to the federal funding process, does not otherwise appear to supplant or replace existing federal requirements, nor does it appear to change the allocation of power within a state to make decisions regarding the application, acceptance and use of such federal funds.

A subsequent Report of the CRS, dated March 25, 2009, reached essentially the same conclusion. [an interpretation which would raise Tenth Amendment issues "would be disfavored."].

We largely agree with the CRS's analysis.¹ In our opinion, ARRA does not give a state

¹ The Tenth Amendment issues present here are difficult. This Amendment to the United States Constitution provides 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.” In *New York v. U.S.*, 505 U.S. 144 (1992), as well as *Printz v. U.S.*, 521 U.S. 898 (1997), the Supreme Court concluded that the Amendment forbids the federal government from “commandeering” state governments. In *New York, supra*, the Court found that “[t]he Federal Government may not compel the states to enact or administer a federal regulatory program.” See also, *Reno v. Condon*, 528 U.S. 141 (2000).

Here, the Tenth Amendment question posed is whether Congress may constitutionally authorize the General Assembly to bypass the Governor, as the chief executive of the State, to speak for the State in acceptance of these funds, or to apply for and use these funds. As noted above, we agree with the CRS Memorandum that the Recovery Act should be so interpreted that the Governor’s prerogative to apply for and use these funds is preserved.

Pursuant to the South Carolina Constitution, of course, the Governor is given a right of veto over any legislative action. Art. IV, § 21 requires that every Bill or Joint Resolution passed by the General Assembly must be given to the Governor for his signature or objection. Section 1607(b), however, authorizes the Legislature to speak for the State without any input by the Governor whatsoever.

Nevertheless, this case may be somewhat different for Tenth Amendment purposes from the “commandeering” cases of *New York* and *Printz*. Involved here is the exercise of Congress’ spending power. See, Art. I, § 8, cl. 1. The United States Supreme Court in *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987) emphasized that a state’s receipt of federal funds is akin to a “contract” and that “[i]ncident to ... [its spending] power, Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’” *Dole* held that the spending power, while broad, and that great deference is given to Congress, is not unlimited. Thus, the decision established four criteria which must be met for a Congressional spending requirement to pass muster under the Tenth Amendment. See, *id.* at 207-208 [expenditure must serve general public purposes; the condition must be unambiguous; the expenditure must be related “to the federal interest in particular national projects or programs” and the condition must not be otherwise unconstitutional.]. In the Court’s view, “a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.” See also, *Oklahoma v. Civil Service Comm.*, 330 U.S. 127 (1947). Further, the Court anticipated that in a particular case, a spending program “might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Id.* at 211, quoting *Steward Machine Co. v. Davis*, 301 US. 548, 590 (1937).

Legislature power, upon adoption of a concurrent resolution, to remove the Governor or other agencies or entities completely from the process of applying for, accepting, and expending in accordance with the provisions of the Recovery Act. Under South Carolina law, a concurrent resolution has no force or effect of law, binding only the particular legislature which adopts it. *Op. S.C. Atty. Gen.*, December 12, 2006. Thus, § 1607(b) provides an alternative avenue to the request of such funds by a state in the event the Governor does not make the required certification within 45 days of enactment pursuant to § 1607(a). Applying longstanding rules of construction, set forth above, it is our opinion that § 1607 does not affect the remaining federal requirements that the Governor, or other state or local officials apply for and utilize ARRA funds in accordance with the provisions of the Act.

Your next question is whether even if “those certifications and applications are still required to be done by the Governor, ... the General Assembly has the power under our state constitution and the laws of South Carolina to mandate a Governor [to] make the necessary certifications and applications necessary to ensure that South Carolina receives its share of the federal stimulus money.” Your concern is whether “the state [may] require Governor Sanford to do something that federal law has given him the discretion over doing or even our constitution permits us to do so.”

In order to address this question, some background information is required. Article I, § 8 of the South Carolina Constitution provides as follows:

In *Dole*, the Court, applying these criteria, upheld the requirement that, as a condition for receipt of highway funds, states must pass an act prohibiting drinking under age 21.

In our view, a Court would likely view the Recovery Act as a spending power case under the criteria set forth in *Dole*. Even so, the Recovery Act would still need to be evaluated to address Tenth Amendment concerns created by Section 1607(b). As noted, we read the Act as requiring that the Governor still must make application for and use of the funds as federal law requires; thus, as the CRS concluded, such a construction would obviate many Tenth Amendment concerns. With respect to acceptance of the funds on behalf of the State by the Legislature only, we note that, routinely, state agencies apply for and accept federal monies without input from the Governor. See *Williams v. Bitner*, 285 F.Supp.2d 593 (M. D. Pa. 2003) [“Legislation enacted pursuant to the spending clause does not violate the Tenth Amendment because states may choose to accept the conditions concomitant with acceptance of federal funds.”] pursuant to Moreover, in light of the fact that these funds could not be spent without an appropriation under state law, the Governor would maintain a constitutional voice through the veto process. See, *Condon v. Hodges*, (Governor’s role under South Carolina Constitution is through exercise of veto).

The Recovery Act must be presumed to be constitutional; however, it is our opinion that only a court can resolve these Tenth Amendment questions definitively.

[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 function of one of said departments shall assume or discharge the duties of any other.

Article III, Section 1 of our Constitution further states that “[t]he legislative power of this State shall be vested in ... the ‘General Assembly of the State of South Carolina.’” Article IV, § 1 provides that “[t]he supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled ‘The Governor of the State of South Carolina.’” And, pursuant to Article IV, § 15, it is stated that

[t]he 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.

In recognizing these various provisions regarding the constitutional requirement of maintaining the separation of powers, our Supreme Court observed in *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312-313, 295 S.E.2d 633, 636 (1982) as follows:

[h]istory reveals that there has been much litigation at the national level and at the state level because of conflicts which have arisen relative to the usurpation of power by one of the three branches of government. There is no forum for the settlement of such disputes other than the courts. The cases are legion upholding and denying constitutionality depending upon the facts. In many instances, a resolution of the dispute is simple. More often, the dispute is in the gray area.

McInnis, as here, involved the power to expend federal funds. In *McInnis*, the Court addressed the constitutionality of the statute creating the Joint Appropriations Review Committee (JARC), composed of certain members of the General Assembly. The Court noted that “[t]he inspiration for the creation of JARC arose from the fact that the federal government has, in recent years, after the appropriations bill had been approved, allocated substantial sums of money by way of revenue sharing, etc. to departments of South Carolina government and local government entities.” Agencies were not only receiving and spending “appropriations which the legislature meant for them to have, but, in addition, substantial federal contributions.” 278 S.C. at 314. Thus, JARC was enacted as a means for “controlling departmental programs and appropriations.” *Id.*

The Court then addressed the constitutional problems under the separation of powers provision created by enabling certain members of the General Assembly, through JARC, to approve federal grant monies before such monies could be spent by agencies within the executive branch. In the Court’s opinion,

[a]n agency, by applying for and receiving grants, for all intents and purposes was, by indirection, coming to determine programs and policy matters which were the province of the General Assembly. The net effect was that the Assembly was not, in the last analysis, determining the total amount of money expended by state agencies. JARC, by exercising the powers allocated to it, makes determinations that should be those of the entire General Assembly. This it undertakes to do, *not through a legislative process, as it surely could*, but through the administration of appropriations which is the function of the executive department. The desirability of the General Assembly's "getting a handle" on these matters is understandable and appropriate but its effort to control these matters through a committee of twelve of its members is constitutionally impermissible.

Id at 314 (emphasis added).

Thus, *McInnis* makes it clear that the General Assembly possesses broad latitude "to determine programs and policy matters" and to determine "the total amount of money expended by state agencies." Such power, however, must be exercised by the "entire General Assembly." On the other hand, the Court stressed that the "administration of appropriations ... is the function of the executive department."

Reconciling these principles, it is also helpful to note that Art. X, § 8 of the State Constitution provides that "money shall be drawn from the treasury of the State ... only in pursuance of appropriations made by law." Indeed, the General Assembly has implemented this provision of the Constitution through enactment of S.C. Code Ann. Sections 11-9-10, making it "unlawful for any moneys to be expended for any purpose except that for which it is specifically appropriated" Moreover, § 11-9-20 makes it a crime for any person charged with disbursement of state funds to exceed the amount and purposes of an appropriation or change or shift appropriations from one item to another.

Such constitutional and statutory limitations and restrictions also apply to federal funds received by the State. We have concluded, based upon *McInnis*, the State Constitution and other authorities that

[j]ust as for any state-generated funds, federal funds in the State Treasury must be appropriated by the General Assembly before expenditure is permissible. Article X, Section 8 of the state Constitution provides that '[m]oney shall be drawn from the treasury of the State ... only in pursuance of appropriations made by law.' See also *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982); *Anderson v. Regan*, 53 N.Y.2d 356, 425 N.E.2d 792 (1981); *Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978). Thus, for at least some purposes, federal funds assume the characteristics of state funds upon their receipt by the State Treasurer and appropriation by the General Assembly.

Op. S.C. Atty. Gen., Op No. 85-26 (March 25, 1985). See also, § 11-35-45 [federal funds must be deposited in State Treasury and treated same as state funds].

The foregoing principles are consistent with numerous decisions of our Supreme Court, as well as opinions of this Office. See, e.g., *State ex rel. Richards v. Moorer*, 152 S.C. 455, 150 S.E. 269 (1929) [“The power of the Legislature over the matter of appropriations is plenary, except as restricted by Constitution.”]; *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993) [recognizing “the Legislature’s power to appropriate revenues as needed among legitimate government objectives”]; *Crawford v. Johnston*, 177 S.C. 399, 181 S.E. 476 (1935) [“unquestionably, the General Assembly may appropriate funds from the State treasury to whatever purpose it thinks proper so long as the acts are not in conflict with the Constitution, even if in doing so, it changes existing laws and requires the levy of additional taxes.”]; *Knotts v. S.C. Dept. of Nat. Resources*, 348 S.C. 1, 8, 558 S.E.2d 511, 515 (2002) [“the Legislature does not have the power to create a law then execute it. The power to execute a law is not incidental to the power to appropriate, but is a separate executive power.”] *Op. S.C. Atty. Gen.*, December 2, 2005 [Comptroller General’s reduction of year end surplus in order to book such monies to pay down a “chronic deficit” is an expenditure without an appropriation by the General Assembly.].

While the General Assembly may not “execute” a law – such execution being an executive function – our Supreme Court has made clear that there is no constitutional impediment to the Legislature’s specifying precisely how and in what manner the funds it appropriates must be spent. The Court stated in *McInnis* that the General Assembly could, legislatively, determine “the total amount of money expended by state agencies,” including federal funds. Moreover, in *Knotts v. S.C. Dept. of Nat. Resources*, *supra* the Court concluded that the Legislature possessed full authority to mandate how funds of the Water Recreational Resource Fund (W.R.R.F.) must be spent. Rather than unconstitutionally delegating to the legislative delegation the power to execute a law, the court observed that

[t]he Legislature has the power to delineate how an executive department may fund a request under the W.R.R.F. The Legislature may statutorily outline how D.N.R. must expend from the W.R.R.F.

348 S.C. at 8.

Several decisions of our Supreme Court illustrate vividly the willingness of our courts to enforce legislative appropriations or other statutory requirements by judicial order when executive officials fail to implement the legislative will. For example in *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992), the Court enjoined the Budget and Control Board from carrying out its efforts to make budget cuts based upon the rate of growth in each agency’s budget over the past year rather than across the board. Emphasizing that “[t]he appropriation of public funds is a legislative function,” the Court held that construing the applicable statute permitting the Board to make across the board cuts so as “to allow the Board to choose any method for reducing

the rate of expenditures with the only limitation being that the reductions be as uniform as practicable would violate the separation of powers provision of the State Constitution.” 310 S.C. at 216.

Moreover, in *Grimball v. Beattie*, 174 S.C. 668, 177 S.E. 668 (1934), the Court issued a mandamus requiring the Comptroller General and Treasurer to issue and pay a warrant for the unpaid balance of the salary of a Circuit Judge. Rejecting the argument that the emergency imposed by the Depression was sufficient cause for the Judge receiving a lesser salary, the Court referenced a statute authorizing a permanent, continuing salary, one fixed in amount together with the time and method of payment. In the Court’s view, this statute was legally sufficient to require members of the executive branch to pay the judge’s salary. The Court stated:

[i]t will be seen that the Constitution prohibits any money being paid out of the state treasury except in pursuance of an appropriation made by law. It is significant that the framers of our Constitution did not require that appropriations be made by an annual appropriations act. The provisions of the Constitution do not require any arbitrary form of expression or particular words in making an appropriation. No particular expression or set of words are requisite or necessary to carry out the provisions of the Constitution. The only limitation is that the appropriations must be made by law. The object of the constitutional provision prohibiting the payment of money from the state treasury except by appropriations made by law is to prohibit expenditures of the public funds at the mere will and caprice of those having the funds in custody without legislative sanction therefor.

State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002) is also particularly instructive. There, the General Assembly, in a budget proviso, had instructed the State Treasurer to transfer \$38,500,000 from the Barnwell Fund to the State’s colleges and universities, thereby restoring previous budget cuts to these institutions of higher learning. This Proviso was not vetoed. Instead, the Governor vetoed the Legislature’s previous budget reductions, a veto which was sustained, thus rendering the budget out of balance. In response to this imbalance, Governor Hodges, together with the Comptroller and Treasurer, effectuated a transfer from the accounts of the schools and colleges to the General Fund in an account in the Governor’s Office.

The Court addressed the question “of whether the combined actions of members of the executive branch violated the separation of powers doctrine by having funds that the General Assembly had specifically appropriated to the schools returned to the General Fund.” 349 S.C. at 243. In its opinion, the Supreme Court emphasized the constitutional prerogative of the General Assembly to appropriate money as part of its lawmaking responsibilities, observing that the Legislature has

the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the

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appropriated monies shall be spent. This the Assembly traditionally does by way of the annual State Appropriations Bill.

349 S.C. at 244, quoting *State ex rel. McLeod v. McInnis*, 278 S.C., *supra* at 313-314. According to the Court, the Governor, as Chief Executive, may voice his objection with respect to various provisions of the Appropriations Act, as he “has the ability, after the General Assembly has passed an appropriations act, of vetoing items or sections within the act.” However, the Court also recognized,

there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly. See SC Code Ann. § 11-9-10 (1986) (“It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated, and *no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act.*”) [emphasis in original]

Id at 245. Accordingly, concluded the Court, “... the authority to transfer appropriated money lies with the General Assembly and not and not the executive branch.” Thus, the Court held as follows:

(b)ecause Proviso 72.109 was not vetoed, the Governor and other members of the executive branch were required to faithfully execute that proviso. S.C. Const. Art. IV, § 14 (Governor shall take care that the laws be faithfully executed). Instead, the proviso was undermined by the combined actions of certain members of the executive branch by transferring funds that had been appropriated to the schools to the General Fund.

We emphasize that the Governor's simple request to the schools that they return the appropriated funds does not in and of itself violate the separation of powers doctrine. However, given the concerted effort of the Governor, the Comptroller General, and the State Treasurer to transfer the appropriated funds to the General Fund, we find the actions of the executive branch have resulted in a separation of powers violation....

Finally, we note that our Supreme Court has concluded that federal funding programs do not operate to alter South Carolina law. As was said in *Creative Displays, Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 73-74, 248 S.E.2d 916 (1978), the Court concluded that a federal Act “cannot and does not change the South Carolina Constitution and statutory law.” This conclusion was reaffirmed in *M. Lowenstein & Sons v. South Carolina Tax Comm.*, 277 S.C. 561, 565, 290 S.E.2d 812, 815 (1982). See also, *Anderson v. Regan*, 53 N.Y.2d 356, 442 N.Y.S.2d 404, 425

N.E.2d 792 (1981) [New York Constitution prohibits monies being paid from state treasury without a legislative appropriation, notwithstanding that federal funds are involved]; *Legislative Research Comm v. Brown*, 664 S.W.2d 907 (Ky. 1984) [federal tax dollars delivered to state became state controlled money to be spent in accordance with state law]; *La. Associated Genl. Contractors v. State*, 669 So.2d 1185 (La. 1996) [federal funds must be spent in accordance with Louisiana Constitution].

Conclusion

It is our opinion that § 1607(b) of the Recovery Act, which permits the General Assembly, by concurrent resolution, to accept federal stimulus funds on behalf of the State if the Governor does not certify within 45 days of enactment that the State will request and use these funds as specified, serves as an alternative to the Governor's certification required by § 1607(a). The adoption of such resolution by the Legislature means that South Carolina has taken the first step in obtaining stimulus funds. We further advise that, in our opinion, the Legislature's concurrent resolution does not replace or supplant other provisions of the Recovery Act which require the Governor, and him alone, to apply for, administer and use these funds. A concurrent resolution has no force or effect of law; moreover, under the Recovery Act's express provisions, only the Governor (or in other cases, other officials pursuant to the particular terms of the Act) may apply to the Secretary of Education (or other federal agencies) for such funds, based upon the federal criteria for eligibility of such funds. Federal law bestows upon the Governor, as chief executive of the State, the discretion as to whether to apply for these funds. See also, *CRS Report*, March 25, 2009 ["once a state legislature has authorized the distribution of funds, then it is up to the discretion of state or local officials as to whether to apply for such funds or not."]

Nevertheless, in our view, an examination of the federal Recovery Act, does not end the inquiry. Our Supreme Court has made clear that a particular federal funding program "cannot and does not change the South Carolina Constitution and statutory law." *Creative Displays Inc. v. S.C. Highway Dept. supra*. Our Court, as well as this Office, have emphasized many times that the South Carolina Constitution (Art. X, § 8) does not permit either state or federal funds to be expended without an appropriation of the General Assembly. An appropriation need not take any particular form, but, nevertheless, such appropriation is constitutionally required before these funds may be expended. Thus, if Recovery Act funds are to be expended by South Carolina, the Legislature must, pursuant to state Constitutional requirements, authorize their expenditure by appropriation.

Moreover, the question becomes the scope and nature of the legal impact an appropriation of these funds by the General Assembly would have upon the Governor's discretion to apply for and use these funds pursuant to federal law. Our Supreme Court has, on numerous occasions throughout the State's history, enforced appropriations in accordance with the Legislature's directive. As the Court held in *State ex rel. Condon v. Hodges, supra*, appropriations which become law must be faithfully executed by the Governor and members of the executive branch. *Condon* concluded that the executive branch could not effectuate the diversion of funds to the general fund to balance the

budget when the Legislature had appropriated such funds to another purpose. In *Grimball v. Beattie, supra*, the Court issued a mandamus against members of the executive branch, thus ordering the payment of funds pursuant to an appropriation. And, in *Gilstrap, supra* the Court enjoined the Budget and Control Board from making proportionate budget cuts, concluding that such cuts would constitute a violation of separation of powers as an infringement of the Legislature's appropriation of funds by the executive branch.

These cases, however, while indicating how our courts have treated conflicts between coordinate branches of government, also reinforce the fact that the General Assembly itself may not coerce the executive branch to act in accordance with the legislative will. The Legislature, the Governor and the Supreme Court have been characterized as "branches of the Government coordinate in rank" with each other. *O'Shields v. Caldwell*, 207 S.C. 194, 195, 35 S.E.2d 184 (1945) (Oxner, dissenting in part). Although the Legislature 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 Legislature to exercise such coercive power over the executive. Thus, if the Legislature appropriates these funds for the uses required in the Recovery Act, or, as you suggest in your letter, enacts a statute which mandates the Governor to apply for and expend these funds pursuant to the purposes specified in the Recovery Act, the Legislature, nevertheless, possesses no power to enforce its will against the Governor.

This enforcement role or coercive power is reserved to the courts. As our Supreme Court concluded in *McInnis, supra*, "[t]here is no forum for the settlement of ... disputes [between the three branches of government] other than the courts." Each such dispute, the Court emphasized, depends "upon the facts."

Accordingly, only the courts possess the power to resolve this dispute between the coordinate and coequal legislative and executive branches. Should the Legislature choose to accept these funds on behalf of South Carolina, and appropriate such funds to the uses required in the Recovery Act, and should the Governor choose not to apply for and utilize the funds – as federal law gives him the power to do – a constitutional standoff would be created. Resort to the judiciary would be necessary to resolve the stalemate. As you suggest in your final question, such litigation could indeed result in enjoinder of the expenditure any Recovery Act funds while the case is proceeding.

In cases such as *Grimball, Gilstrap*, and *Condon v. Hodges, supra*, our Supreme Court has on previous occasions resolved conflicts between the legislative and executive branches by giving force to the legislative appropriation, thereby requiring the executive branch to faithfully execute the law. Here, however, federal law bestows broad discretion upon the Governor, as the chief executive of the State, to decide whether or not to apply for and utilize these funds. Thus, this situation may be perceived as somewhat distinct from the previous cases decided by our courts, referenced above. Moreover, here, a court would need to resolve the Tenth Amendment questions present. *See*, n. 1 above. Nevertheless, while there are distinctions here not present in previous cases, we advise that

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McInnis strongly indicates our Supreme Court would not treat federal funds differently from state generated funds, and would thus require a legislative appropriation in order to expend such funds. See also, § 11-35-45 [“All federal funds received must be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn from the State Treasury as needed, as that provided for the disbursement of state funds.”]; *Shapp v. Sloan, supra* [“Appellants have failed to prove their basic premise that funds not raised under general state law are constitutionally differentiated from other funds in the state Treasury, and thus constitutionally beyond the scope of the General Assembly’s authority.”]. We further advise that earlier precedents of our Supreme Court, referenced above, have required the executive to “faithfully execute” any state law or appropriation enacted by the General Assembly relative to the expenditure of state or federal funds. See also, *County of O’Neida v. Berle*, 404 N.E.2d 133 (N.Y. 1980) [state Constitution bestows *no implied power* in the executive branch to impound funds or reduce appropriations]; *Community Action Programs v. Ash*, 365 F.Supp. 1355 (D. N. J. 1973) [once funds are appropriated for a specific program, “the Executive Branch has a duty to spend them.”].

Yours very truly,



Henry McMaster

HM/an