Vermont Legislative Council

Memorandum

To: Rep. Oliver Olsen

From: Michael O'Grady

Date: April 11, 2017

Subject: Executive Orders—Legislative Disapproval by Resolution

I am writing in response to your question regarding the process under 3 V.S.A. § 2002 for issuance by the Governor of an Executive Order for reorganization of government. You asked whether the ability of one body under 3 V.S.A. 2002 to disapprove of a proposed Executive Order violates the Enactment Clause, which requires "no bill, resolution, or other thing, which shall have been passed by the one [body], shall have the effect of, or be declared to be, a law, without the concurrence of the other [body]."[1]

Legitimate legal arguments can be made both in support of and against the constitutionality of the process set forth under 3 V.S.A. §2002. As we discussed, I will not have the time before tomorrow to fully vet the argument for and against the constitutionality of 3 V.S.A. § 2002. This memo provides an abbreviated and superficial analysis of each argument.

The General Assembly is the lawmaking power of government[2] This lawmaking authority vests the ultimate control over policymaking with the General Assembly rather than Executive Branch officials.[3] The Executive Branch does not have power to make law, but to execute it. It can be argued that 3 V.S.A. § 2002 is a grant of authority to the Governor to execute the laws within the policy limits established by the legislature.[4]

The Vermont Constitution does not expressly provide the Governor with Executive Order authority. The General Assembly granted the Governor the authority to issue Executive Orders for reorganization under 3 V.S .A. §§ 2001 and 2002. When the General Assembly grants statutory authority it must provide intelligible principles to guide the Executive Branch.

These intelligible principles include statutory criteria for exercise of the authority, including requirements for when and how the Governor can propose and implement an Executive Order. The requirement that the Governor propose an Executive Order by January 15 and the 90 day review period by the General Assembly are criteria for the exercise of the authority. Similarly, the provision that neither body of the General Assembly object to a proposed Executive Order could be viewed simply as a criterion for exercise of the statutory authority.

In contrast, the authority under 3 V.S.A. § 2002(b) allowing the General Assembly to disapprove of a proposed Executive Order may raise constitutional issues. Specifically, the act of disapproval of a proposed Executive Order is arguably an act of legal significance that is "legislative in character." Action by the General Assembly which is an act of legislation must be enacted by both Houses and presented to the Governor before it becomes law.

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[1] Vermont Const. Ch.II, § 6.
[2] Town of Sheldon v. Sheldon Poor House, 135 A. 492, 494 (1927); *see also* State v. Parker, 26 Vt. 357 (1854).
[3] Martin v. State, 175 Vt. 80, 87 (2003), *citing* 1 N. Singer, Statutes and Statutory Construction § 4.15 at 166 (1994).
[4] The legislative findings for 3 V.S.A. §§ 2001 and 2002 support this argument. See No. 245 Leg. Sess. 1969, § 1.

The Vermont Supreme Court has held that all legal enactments must be presented to the Governor for approval before given the force and effect of law.[5] Moreover, in an advisory opinion, the Vermont Attorney General discussed what is appropriate for legislation and what is appropriate for resolution. The Attorney General opined that a bill is necessary when permanent direction and control of matters are to be taken.[6] A resolution is proper when a legislature merely desires to express an opinion which has only temporary effect.[7]

It could be argued that a resolution disapproving an Executive Order is an act of the General Assembly that has the force and effect of law and is permanent in its control of the question. The resolution likely would have the effect of permanence for at least the "year in which the General Assembly sits" since it could not be superseded once adopted. A U.S. Supreme Court decision with similar facts supports the argument that the resolution disapproving an Executive Order issued under 3 V.S.A. § 2002 is legislative in nature and requires presentment to both bodies.

In *I.N.S. v. Chadha*,[8] the U.S. Supreme Court struck down §244(c)(2) of the Immigration and Nationality Act. This provision authorized one House of Congress, by resolution, to invalidate the Attorney General's decision pursuant to delegated authority to allow a particular deportable alien to remain in the United States. The Supreme Court concluded a resolution adopted under §244(c)(2) was "essentially legislative in purpose and effect," requiring bicameral passage and presentment to the president.[9]

The Court based its decision on four grounds. First, it determined a resolution by the U.S. Congress would have the purpose and effect of altering the legal rights, duties, and relations of persons outside the legislative branch. Next, it determined that a resolution would allow a House of Congress to exercise authority delegated to the U.S. Attorney General—namely whether or not to deport someone. Next, it concluded a decision to override the Attorney General's opinion would involve determinations of policy that Congress can implement only through bicameral passage followed by presentment to the President. Last, the Court reviewed how there are only four provisions in the Constitution that explicitly and unambiguously allow one House to act alone with the force of law, and objecting a deportation decision of the Attorney General was not one of the articulated four provisions.[10]

In conclusion, there are colorable arguments supporting both positions regarding the constitutionality of the process for issuing an Executive Order for reorganization under 3 V.S.A. § 2002. To my knowledge, no Vermont court has yet addressed the issue. If a court were to find unconstitutional the process by which the General Assembly disapproves a resolution under 3 V.S.A. § 2002, it could find the entire authority in 3 V.S.A. § 2001 and 2002 unconstitutional. In the alternative, a court could determine the approval provision in 3 V.S.A. § 2002(b) is severable from the rest of 3 V.SA. §§ 2001 and 2002, thereby allowing the Governor to issue Executive Orders of reorganization with no limit other than the deadline for submission and 90 day review period.

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[5] 1964-66 Op. Atty. Gen. at 88-89 (internal citations omitted), citing Kellogg v. Page, State Treasurer, 44 Vt. 356 (1871).
[6] 1964-66 Op. Atty. Gen. at 88-89.
[7] Id.
[8] 462 U.S. 919 (1983).
[9] Id at 951-952.
[10] Id at 953-955.