



COMMONWEALTH of VIRGINIA

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January 3, 2014

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The Honorable Robert G. Marshall
Member, House of Delegates
Post Office Box 406
Richmond, Virginia 23218

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the Governor has the power to issue a policy directive to suspend a regulation that was properly adopted pursuant to a statutory mandate.

Response

It is my opinion that, while the Governor has a significant role to play in the formulation of regulations promulgated by executive branch agencies, the Virginia Constitution prohibits the Governor from unilaterally suspending the operation of regulations that have the force of law.¹

Background

The legislative power of the Commonwealth is and has been vested in the General Assembly.² Nevertheless, as the scope and reach of government increased, some thought it necessary to create administrative agencies (sometimes referred to as "executive branch agencies") to promulgate regulations to provide for specific applications of the broader policy concerns addressed in legislation passed by the General Assembly. The authority for the existence of such agencies is found in Article III, § 1 of the Virginia Constitution,³ which provides in pertinent part that "administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe."

¹ Your inquiry is stated in general terms; however, you then specifically reference a statement made by the Governor-elect, when he was a candidate, about regulations regarding the treatment of abortion facilities as hospitals. The same conclusion results regardless of the particular subject matter.

² VA. CONST. art. IV, § 1.

³ Article III, § 1 also is one of the two provisions of the Virginia Constitution that mandates the separation of powers among the three branches of government. The dispensation for the creation of administrative agencies is the limited "exception to the basic principle" of separation of powers. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 433 (1974).

The grant of power to administrative agencies is limited. “[D]elegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power. Delegations of legislative power that lack such policies and standards are unconstitutional and void.”⁴ Furthermore, administrative agencies are often required to adopt regulations pursuant to the Virginia Administrative Process Act (“APA”).⁵ Pursuant to the APA, agency regulations are, prior to becoming effective, subject to public notice, and potentially, public hearings,⁶ subject to public comment and, potentially, the taking of evidence,⁷ subject to review by both the Attorney General and the Governor,⁸ and subject to legislative review.⁹ If an agency enacts a regulation consistent with its statutory charge¹⁰ and that regulation has gone through the required regulatory processes for promulgation, it has the force of law.¹¹

Applicable Law and Discussion

Before addressing the specific issue of whether the Governor has the authority to suspend a validly adopted regulation, it is important to recognize that the Governor has a significant ability to affect the issuance of regulations *prospectively*. As noted above, he has a statutory role in the adoption of regulations under the APA.¹² Additionally, the Governor affects the composition of administrative agencies through his appointments of the heads of administrative agencies¹³ and their respective boards.¹⁴ Furthermore, the Virginia Constitution explicitly authorizes the Governor to require certain officers and employees within state agencies to provide him with reports of the agency’s activities and to allow him to inspect the agencies financial and other records.¹⁵

Another method governors have employed to influence the operations of state government is through the issuance of written directions. Whether called executive orders, executive directives, or guidance documents, these directions have been used by governors to have administrative agencies pursue the governor’s policy objectives. Before turning to whether the Governor unilaterally may issue such directions to suspend a validly adopted regulation, it is helpful to review the Governor’s general authority to issue such orders, directives, or guidance documents.

⁴ Bell v. Dorey Elec. Co., 248 Va. 378, 380, 448 S.E.2d 622, 623 (1994) (internal citation and quotation marks omitted).

⁵ VA. CODE ANN. §§ 2.2-4000 through 2.2-4031 (2011 & Supp. 2013).

⁶ Section 2.2-4007.01 (2011).

⁷ Sections 2.2-4007 (2011); 2.2-4009 (Supp. 2013).

⁸ Section 2.2-4013 (2011).

⁹ Section 2.2-4014 (2011).

¹⁰ Manassas Autocars, Inc. v. Couch, 274 Va. 82, 87, 645 S.E.2d 443, 446 (2007) (citations omitted) (“Regulations . . . may not conflict with the authorizing statute.”).

¹¹ *Id.* at 445, 645 S.E.2d at 446 (citation omitted).

¹² Section 2.2-4013.

¹³ VA. CONST. art. V, § 10 (“Except as may be otherwise provided in this Constitution, the Governor shall appoint each officer serving as the head of an administrative department or division of the executive branch of the government, subject to such confirmation as the General Assembly may prescribe. Each officer appointed by the Governor pursuant to this section shall have such professional qualifications as may be prescribed by law and shall serve at the pleasure of the Governor.”).

¹⁴ VA. CODE ANN. § 2.2-107 (2011).

¹⁵ VA. CONST. art. V, § 8.

The Supreme Court of Virginia has noted that “[u]nder our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws.”¹⁶ No provisions of the Constitution of Virginia or any statute explicitly grant to the Governor the authority to issue executive orders. Governors historically have issued executive orders based upon the authority inherent in the constitutional duty of the Governor to “take care that the laws be faithfully executed.”¹⁷ Prior opinions of the Attorney General recognize that the Constitution grants to the Governor a general reservoir of powers as chief executive of the Commonwealth.¹⁸ Thus, the authority of the Governor to issue executive orders is well established in the law and history of the Commonwealth.

The scope of such authority, however, is limited. The Governor may not use an executive order (or any other means) to exercise legislative power, which is vested solely in the General Assembly.¹⁹ Furthermore, the Governor may not issue executive orders or take other action that is contrary to express provisions of the Virginia Constitution.²⁰ Thus, if an executive order or other written direction amounts to an exercise of legislative power or violates a provision of the Virginia Constitution, the Governor is without power to issue it and the written direction necessarily is void.

Applying this legal background to your specific inquiry, it becomes clear that the Governor may not unilaterally (whether by executive order, executive directive or guidance opinion²¹) suspend the operation of a validly enacted regulation. As explained below, any attempt to do so would represent a violation of Article V, § 7, Article I, § 7, and the separation of powers provisions of the Virginia Constitution.

Prohibiting the executive from suspending duly enacted laws has long been part of Virginia’s constitutional history. The drafters of both the Virginia Constitution and the United States Constitution were very familiar with claims that the executive had the authority to suspend or dispense with duly enacted laws, and both sets of framers sought to borrow from the English experience and prevent the executive from claiming such a power in the New World. As one scholar has noted regarding the drafting of the United States Constitution,

In 1689, following the forced abdication of James II, Parliament enacted the English Bill of Rights. The first declaration of that momentous statute was “that the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal.” The royal dispensing prerogative was also declared illegal.

The English Bill of Rights became a template for American constitution drafting. Virtually every secular provision in that statute was incorporated into the U.S. Constitution. The prohibition on the suspending and dispensing powers was encoded in

¹⁶ *Lewis v. Whittle*, 77 Va. 415, 420 (1883).

¹⁷ VA. CONST. art. V, § 7.

¹⁸ See 1983-84 Op. Va. Att’y Gen. 180; 1945-46 Op. Va. Att’y Gen. 144.

¹⁹ See VA. CONST. art. I, § 5; art. III, § 1; art. IV, § 1.

²⁰ *Lewis*, 77 Va. at 420.

²¹ As they pertain to regulations, “guidance documents” are referenced in § 2.2-4008 of the *Code of Virginia*. Nothing in § 2.2-4008 would allow for a guidance document that was inconsistent with the regulation itself or the relevant authorizing statute. Rather, guidance documents, as properly understood, only may explain or amplify the relevant regulation or statute. Definitionally, suspending the operation of a regulation would neither explain nor amplify the regulation, but rather, only subvert it.

Article II's requirement that the President must "take Care that the Laws be faithfully executed." Thus, these rejected royal prerogatives were denied to the President.^[22]

The drafters of Virginia's Constitution adopted nearly identical language, seeking to effectuate the same prohibition.²³ Article V, § 7 of the Virginia Constitution provides, in pertinent part, that "[t]he Governor shall take care that the laws be faithfully executed."²⁴

Validly implemented regulations carry the force of law;²⁵ thus, it should be self-evident that unilaterally issuing a directive that suspends or ignores such a regulation is inconsistent with the Governor's duty to "take care that the laws be faithfully executed." To conclude otherwise would grant the Governor a suspending power that has been denied to the English King since at least 1689 and would render the "take care" clause of the Virginia Constitution a mere nullity. Simply stated, the Virginia Constitution's "take care" clause prohibits the Governor from issuing instructions (whether by executive order, executive directive or guidance opinion) that a valid regulation be suspended or ignored.

While the framers of the federal constitution apparently believed that the federal "take care" clause was sufficient to make clear that the executive could not suspend validly enacted laws, Virginia went one step further. Article I, § 7 of the Virginia Constitution expressly provides "[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."²⁶ Thus, the prohibition that is implicit in Article V, § 7's "take care" clause is made explicit by Article I, § 7: the Governor may not unilaterally direct, by any means, that a validly adopted regulation that has the force of law be suspended or ignored.

Irrespective of the prohibitions found in Article V, § 7 and Article I, § 7, the Virginia Constitution nonetheless would prohibit the Governor from unilaterally suspending a validly adopted regulation carrying the force of law. Specifically, such action would violate the separation of powers provisions found in Article I, § 5 ("That the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . ") and Article III, § 1 ("The legislative, executive, and judicial

²² Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 280 (2009) (footnotes omitted).

²³ Whether the nation borrowed from Virginia or whether Virginia borrowed from the nation is unclear. Virginia's "take care" clause first appears explicitly in the Virginia Constitution of 1830. VA. CONST. of 1830 art. IV, § 4. At least one scholar has suggested that the federal "take care" clause "descends to us from the English Bill of Rights, via the Virginia Constitution, and was intended to forbid the executive's suspension of statutes." Peter M. Shane, *Restoring Faith in Government: Presidents and the Separation of Powers, Pardons, and Prosecutors: Legal Accountability*, 11 YALE L. & POL'Y REV. 361, 393-94 (1993) (footnote omitted).

²⁴ As noted in note 23 *supra*, this language first appeared in the Virginia Constitution of 1830. It has appeared in every subsequent version of the Virginia Constitution. See VA. CONST. of 1851 art. V, § 5; VA. CONST. of 1864 art. V, § 5; VA. CONST. of 1870 art. IV, § 5; and VA. CONST. of 1902 § 73.

²⁵ See *Manassas Autocars, Inc.*, 274 Va. at 87, 645 S.E.2d at 445. See also VA. CODE ANN. § 2.2-4001 (2011) (defining a "regulation" under the Administrative Process Act as "any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.").

²⁶ The explicit prohibition on suspending laws first appeared as § 7 of the Virginia Declaration of Rights of 1776. It has appeared in every subsequent version of the Virginia Constitution. See VA. CONST. of 1830 art. I, § 7; VA. CONST. of 1851 art. I, § 7; VA. CONST. of 1864 art. I, § 7; VA. CONST. of 1870 art. I, § 9; and VA. CONST. of 1902 § 7.

departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . .”).²⁷

It must be remembered that, when adopting a regulation, an administrative agency is not engaged in an executive function, but rather, it is exercising legislative authority that has been delegated to it by the General Assembly. As noted above, the authority for the existence of such agencies is found in Article III, § 1 of the Virginia Constitution, which provides in pertinent part that “administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.” Because administrative agencies are exercising delegated legislative authority, a unilateral attempt²⁸ by the Governor to suspend a validly enacted regulation is as much a violation of the separation of powers as if the Governor sought to suspend the operation of a Virginia statute. It is simply beyond a Governor’s power to do so, and any such attempt is void.

This conclusion is consistent with the APA’s provisions regarding withdrawal of regulations. Section 2.2-4016 provides that

[n]othing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the adoption of regulations.

Thus, for regulations promulgated under the APA, it is clear that the executive branch (in this case the relevant agency itself) has the ability to dispense with a regulation at any time prior to its effective date; however, once it becomes effective, the executive no longer may dispense with the regulation unilaterally. Rather, the regulation can be changed or suspended only by going through the full APA process, as a result of a change in the authorizing statute being passed by the General Assembly and becoming law, or by order of a court of competent jurisdiction. Thus, a guidance opinion from the Governor is not legally sufficient to effectuate a change in or suspension of a validly enacted regulation.

Conclusion

Accordingly, it is my opinion that that, while a Governor has a significant role to play in the formulation of regulations promulgated by executive branch agencies, the Virginia Constitution prohibits a Governor from unilaterally suspending the operation of regulations that have the force of law.

²⁷ The separation of powers is a bedrock principle of Virginia government. The concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. *See* VA. CONST. of 1830 art. I, § 5 & art. II; VA. CONST. of 1851 art. I, § 5 & art. II; VA. CONST. of 1864 art. I, § 5 & art. II; VA. CONST. of 1870 art. I, § 7 & art. II; and VA. CONST. of 1902 §§ 5 & 39.

²⁸ It is conceivable that there could be circumstances where a statute or regulation allows for the regulation to be suspended under certain circumstances, and thus, such suspension would not necessarily violate the separation of powers. You do not inquire about such a scenario, and a review of all of the specific facts and circumstances would be necessary to determine if such a scenario violated some portion of the Virginia Constitution. Accordingly, such inquiry is beyond the scope of this opinion, and I do not address it in the abstract here.

Honorable Robert G. Marshall
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With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized with a large "K" and "C", and the Roman numeral "II" is written in a smaller font to the right.

Kenneth T. Cuccinelli, II
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