THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

February 5, 2024

Senator Scott Kawasaki
Chair, Senate State Affairs Committee
Senate.State.Affairs@akleg.gov

Re: Executive Order No. 128

Dear Senator Kawasaki:

With this letter, I wish to follow up on the Committee's request for the Department of Law's response to Legislative Legal Service's memorandum of January 26, 2024 opining on the legality of Executive Order 128. [1]

Executive order 128 creates a new board of directors for the Alaska Energy Agency, including establishing the membership of the new board. In its January 26, 2024 memorandum, Legislative Legal Services offered its opinion that EO 128 exceeds the governor's authority under art. III, sec. 23 of the Alaska Constitution. Leg Legal argues that the establishment of members of a board and their qualifications exceeds the authority to reorganize the executive branch. According to Leg Legal, executive orders may not "create new law."

On the contrary, sec. 23 plainly states that "changes" to the executive branch made by EOs "have the force of law." Leg Legal's contention is at odds with the minutes of the Alaska Constitutional Convention, where executive orders were expressly described as "reverse legislation" that "makes a new law."[2] Construing a nearly verbatim provision of its constitution, the Michigan Supreme Court held that the governor's reorganizational

---

[1] Memorandum dated January 26, 2024 from Emily Nauman to Senate President Gary Stevens, re: Executive Order 128: Separate the Alaska Energy Agency from the Alaska Industrial Development and Export Authority (Work Order No. 33-GH2466\A), https://www.akleg.gov/basis/get_documents.asp?session=33&docid=27934, ("Leg Legal Memo").

[2] Minutes of the Alaska Constitutional Convention ("ACC Minutes"), at pg. 2229 (Londborg).

power is "nearly plenary" and "equal" to that of the legislature.[3] "The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself."[4]

Practically speaking, the power to reorganize the executive branch by law necessarily includes the power to create new law essential to accomplish the reorganization. In the case of a new board, the executive order must establish the board membership and their qualifications, or else the board cannot be constituted. In Executive Order 27, for example, Governor Egan established the State of Alaska Reconstruction and Development Planning Commission. In doing so, he not only assigned its functions but established its membership.

The Department of Law further does not agree with Leg Legal's prediction that a court would likely invalidate an EO because it contains new law. Rather, we believe that courts in Alaska would agree with the courts of Michigan that "[b]ecause the Governor's action has the status of enacted legislation, it is entitled to the same presumption of constitutionality that an equivalent statute would enjoy."[5] Consequently, the "judiciary should construe the executive orders as constitutional unless unconstitutionality clearly appears."[6]

This letter will describe the history and scope of sec. 23 and examine the legal bases of the governor's executive order authority as it relates to EO 128. To summarize:

- Art. III, sec. 23 creates two gubernatorial powers: to make changes in 1) the **organization of the executive branch** and 2) the **assignment of functions** among its units. Where those changes require the **force of law**, the governor must do so by executive order.
- Sec. 23 is a grant of **positive legislative power** to the governor (not merely negative, as in the case of the veto).
- Reorganization power is **bounded**, but within those bounds it is **nearly plenary** and **equal** to that of the legislature. The governor **can do anything the legislature could** within the sphere of reorganization.
- The governor may **reassign functions** among units but **may not create or destroy** functions.

---

3 *Straus v. Governor*, 583 N.W.2d 520, 524 (Mich. 1998); *House Speaker v. Governor*, 506 N.W.2d 190, 202 (Mich 1993).

4 *Straus,* 583 N.W.2d at 524.

5 *Id.*

6 *Id.*

- The governor may change the organization of the executive branch by **creating, modifying, or eliminating units**. To do so, an executive order must **necessarily create new law**.
- New law must be **necessary and appropriate to effectuate the reorganization**. Changes in an executive order that do not accomplish the reorganization are beyond the scope of the governor's sec. 23 power.
- When an executive order creates a new unit, the order must set forth **minimum criteria to establish the unit** so that it can function. For example, in the case of a board, the order needs to identify who its members will be and how they will be appointed, or else it cannot be constituted.

ALASKA'S EXECUTIVE BRANCH

Alaska's system of government is noted for its exceptionally strong and unified executive branch, compared with other states.[7] Indeed, it was explicitly the goal of the drafters of the Alaska Constitution to establish a "strong executive."[8] In part, the drafters were reacting to their experiences during the territorial period, when "government authority was diffuse and remote from the people" and executive power was "deliberately diluted by the territorial legislature through its creation of commissions or elected offices to oversee administrative functions which fell within its purview."[9]

Article III of the Alaska Constitution allocates the powers of the governor and provides for the structure and functions of the executive branch.[10] Unlike many other state constitutions, which "impose directly or indirectly a basic organizational scheme on the executive branch," the Alaska Constitution leaves the structure almost entirely up to statute.[11] The constitution does not provide for elected constitutional officers, nor does it specify a plethora of constitutionally mandated departments, agencies, or commissions.[12]

---

7 *See, e.g.,* Harrison, G., *Alaska's Constitution: A Citizen's Guide*, 5th Ed., pg. 75. ("Few state constitutions grant as much authority to the governor as does Alaska's.").

8 ACC Minutes, at pg. 1102 (Rivers, V.) ("[T]he Executive Committee has worked on the theory of the strong executive. That was the intention throughout the article to centralize authority and responsibility for the administration of government, enforcement of laws, in a single elective official.").

9 Harrison, at pg. 75.

10 *Id*.

11 *Id*, at pg. 87.

12 *Id*. *See also* ACC Minutes, at pg. 1987-88 (Rivers, V.) ("Now in the matter of the setting up of the state departments, the Committee in order to help effectuate the strong executive did not name department heads or departments as such … So as we envision

Instead, it grants maximum flexibility to arrange, and rearrange, the executive branch by law in order to maximize efficiency and effectiveness.[13] At the same time, the drafters aimed to ensure direct accountability of the executive branch to the governor.[14]

Section 22, art. III of the Alaska Constitution allocates to the legislature the "constitutional power to allocate executive department functions and duties among the offices, departments, and agencies of the state government."[15] This section provides that

> [a]ll executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes.[16]

Section 22 further authorizes the legislature to establish by law "[r]egulatory, quasi-judicial, and temporary agencies" that may, but "need not be allocated within a principal department."[17]

Each principal department is supervised by the governor.[18] Principal departments are headed by a single executive, unless otherwise provided for by law.[19] Department heads are appointed by the governor, subject to confirmation by a joint session of the legislature, and, except for the lieutenant governor, are subject to removal without cause by the governor.[20]

---

the state now, it would never have more than 20 principal departments, although there might be a great many subdivisions thereof.").

13 Harrison, at pg. 87.

14 *Id*. at 88 ("Accountability of the governor is greatly diminished in those states with "plural executives," that is, those with directly elected department heads and commissioners.").

15 *Capital Info Group v. State of Alaska*, 923 P.2d 29, 40 (Alaska 1996).

16 AK Const., art. III. sec. 22.

17 *Id*.

18 *Id.*, at sec. 24.

19 *Id.*, at sec. 25.

20 *Id.* (Department heads "serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state"). The reference to the "secretary of state" rather than the lieutenant governor is likely just an omission. *See* Harrison, at pg. 90.

The legislature may also establish a board or commission as the head of a principal department, rather than a single individual.[21] The members of such boards and commissions are also appointed by the governor, subject to confirmation by the legislature.[22] Unlike unitary department heads, however, the members of boards and commissions are removed "as provided by law."[23]

SECTION 23 OF ARTICLE III

Although the constitution allocates power to structure the executive branch to the legislature, sec. 23 of art. III grants to the governor a concurrent power to "make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration."[24] Organizational changes made pursuant to this provision that "require the force of law" must be "set forth in executive orders."[25]

Pursuant to enacting statute, the governor must submit proposed reorganizational executive orders to the presiding officer of each house on the day the house organizes.[26] The legislature has 60 days of a regular session, or the entirety of a legislative session less than 60 days, to disapprove an executive order.[27] Unless disapproved by a majority of the legislature in a joint session, reorganizational executive orders become effective on a date designated by the governor.[28] An executive order is then published in the bound session laws and codified as Alaska law.[29]

The legislature's authority to disapprove reorganizational executive orders is sometimes referred to as a "legislative veto" because it mirrors the governor's power to

---

21 *Id.,* at sec. 26. This section also permits the legislature to set a board or commission as the head of a regulatory or quasi-judicial agency.

22 *Id.*

23 *Id.*

24 *Id*. at sec. 23.

25 *Id*.

26 AS 24.08.210.

27 *Id.*

28 *Id*. Section 23 is not the only gubernatorial authority to issue executive orders. As provided in AS 24.05.150, the governor is authorized to issue an executive order adjourning the legislature upon receipt of certification of either house that there is a disagreement regarding the time for adjournment. This memo refers to sec. 23 executive orders as "reorganizational" executive orders to distinguish them.

29 *Id*.

veto legislation passed by the legislature.[30] As in the case of the governor's veto, the legislature may prevent an executive order from becoming law by disapproving it, while sec. 23 provides no authority for the legislature to amend or otherwise alter the executive order as it was originally submitted by the governor.[31]

Section 23 thus facilitates the governor's ability to alter the structure of the executive branch and strengthen oversight of the administration.[32] Because sec. 22 reserves to the legislature the power to structure the executive branch in the first instance, the governor would otherwise need to introduce legislation to make structural and administrative adjustments within and among the principal departments, in the absence of a reorganizational executive order.[33]

Legislation would be subject to amendment by the legislature, potentially in ways that the governor did not want.[34] In addition, legislation requires affirmative assent of a majority of each house, whereas the legislature must take affirmative action to prevent enactment of a reorganizational executive order.[35] While the legislature still retains the power to veto executive orders, sec. 23 "definitely biases the outcome in favor of the governor's plan."[36]

However, not every administrative change by the governor must be accomplished by a reorganizational executive order. An executive order is required where the reorganization "requires the force of law."[37] This has previously been interpreted by the Department of Law to mean that a statutory amendment is required to effectuate the change

---

30 *See, e.g., State v. A.L.I.V.E.*, 606 P.2d 769, 774-75 (Alaska 1980).

31 Section 506 of the model constitution, discussed *infra*, which formed the basis of sec. 23, permitted the legislature to "disapprove or modify" an executive order. Nat'l Mun. League, *Model State Constitution: With Explanatory Articles*, pg. 9-10 (5th Ed., Rev. 1948). Modification authority is conspicuously absent from section 23.

32 *See, e.g.,* Harrison, at pg. 87 ("This provision bolsters the governor's management powers by simplifying the task of altering the organization of the executive branch.").

33 *See, e.g.,* Minutes of the Alaska Constitutional Convention ("ACC Minutes"), pg. 2229 (Longbord) ("[N]ow the other way would be if the governor wanted some reorganization he would have to go to the legislature and have a bill introduced by somebody or on his own request and that bill would be acted upon to make this necessary change.").

34 Harrison, at pg. 87.

35 Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1613, 1629 (2010) ("change occurs if the legislature does nothing").

36 Harrison, at pg. 87.

37 AK Const., art. III, sec. 23.

because the functions or units addressed by the executive order are already set forth in statute.[38] Changes to executive branch structure that do not implicate a statutory amendment may be accomplished without the necessity of an executive order and are often, although not necessarily always, accomplished by administrative order.[39]

Although Alaska governors have issued over 120 reorganizational executive orders since statehood, there are few published court opinions construing this section. In *Suber v. Alaska State Bond Committee*, the Alaska Supreme Court considered a challenge to the Alaska Mortgage Adjustment Plan, which established administrative guidelines for a program of grants to provide mortgage relief to earthquake victims.[40] Among other legal theories, the plaintiff taxpayer argued that the plan required a reorganizational executive order because it provided for the creation of the Alaska Mortgage Adjustment Agency within the department of commerce.[41]

Rejecting this claim as "untenable," the court found that the commissioner of the department was already authorized by statute to undertake the functions of the agency.[42] The establishment of the agency by the governor's plan constituted "nothing more than a recognition of the fact that specific personnel would be charged with the responsibility of administering the Program under the Commissioner of Commerce."[43] It was "in no sense the creation of an executive agency by the Governor."[44]

In *Rae v. State*, a *pro se* prisoner challenging his detention argued that the governor's establishment of the department of corrections by reorganizational executive order violated the Alaska Constitution.[45] The Alaska Supreme Court dismissed this contention as having

---

38 *See, e.g.*, 1986 Inf. Op. Att'y Gen. (Sept. 12, File No. 663-87-0094) (consolidating the division of mining with the division of geological and geophysical surveys must be accomplished by EO because "there are at least three statutory references to the division of geological and geophysical surveys.").

39 *See, e.g.,* 1991 Inf. Op. Att'y Gen. (Dec. 24, File No. 663-92-0294) (Moving AOGCC to DNR for administrative purposes may be accomplished by AO, although "it appears that the initial allocation was not even done through an administrative order, since no order assigning the AOGCC to DCED exists.").

40 *Suber v. Alaska State Bond Committee,* 414 P.2d 546, 550 (Alaska 1966).

41 *Id*. at 556.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Rae v. State*, 407 P.3d 474, 478 (Alaska 2017).

"no merit" in a single sentence, simply noting that the constitution "clearly empowers the executive to adjust the organization of its agencies."[46]

EXECUTIVE POWER AND ADMINISTRATIVE REORGANIZATION: HISTORICAL BACKGROUND

The drafters' goal of consolidating executive authority in the governorship was part of a larger historical trend of increasing gubernatorial power nationwide, gaining momentum in the early 20th century and continuing to this day.[47] In the early days of the Republic, governors were intentionally reduced to "little more than Cyphers" while "legislatures [were] omnipotent."[48] Declining confidence in state legislatures during the 19th century coincided with a proliferation of elected state offices and independent commissions, board and agencies, resulting by the dawn of the 20th century in state governments that were seen as prolix, fractionalized, and counter-productive.[49]

During the Progressive Era, reformers sought to improve the effectiveness and efficiency of government through consolidation under a stronger unified executive.[50] These trends were spearheaded at the federal level, where Congress began experimenting in 1932 with legislation granting the President power to reorganize the federal executive branch by

---

46 *Id*.

47 Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496-99 (2017).

48 Notes of James Madison (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25, 35 (Max Farrand ed., 1911). Previously, colonial era governors had been the omnipotent ones. *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 IOWA L. REV. 78 (1964) ("From conflicts between these colonial governors and the elected colonial representatives there developed an understandable, but, arguably, shortsighted, desire upon the part of the newly independent colonists to emasculate the office of governor and thus insure against abuses from that source.").

49 Seifter, at pg. 496.

50 *Id*. The move for a unified executive seems to work at cross-purposes with the other major area of Progressive reform, agency independence from political interference. *Id*. ("One initial aim of Progressive reformers was to reduce the excessive politicization of governance, and they pursued this in part by creating myriad politically insulated boards and commissions to administer new government programs.").

executive order, subject to legislative approval.[51] The federal Reorganization Act provided a model for subsequent state efforts, including Alaska.[52]

Congress jealously guarded its prerogative over executive branch organization, however, and never granted the president complete reorganizational discretion.[53] It periodically tinkered with the president's reorganizational authority, increasing it or decreasing it as circumstances dictated.[54] Presidential reorganization authority was always temporally limited, requiring periodic reauthorizations that Congress was not always eager to grant.[55]

The Reorganization Act of 1949 was in effect at the time the drafters of the Alaska Constitution were at work in 1955.[56] The 1949 Act provided for a single chamber veto (subsequently held unconstitutional by the U.S. Supreme Court in *Chadha v. INS*).[57] The Act also liberalized the president's powers by eliminating previous exemptions from reorganization for enumerated agencies.[58] In addition, the president was permitted to establish new departments, although he was prohibited from eliminating them, including by merging departments.[59]

Meanwhile, at the state level, New Hampshire lead the way, enacting gubernatorial reorganization authority statutorily in 1949.[60] The concept of gubernatorial reorganization

---

51 Henry B. Hogue, *Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress*, Congressional Research Service (Dec. 11, 2012). In fact, Congress earlier granted President Wilson temporary reorganization power during World War I. *Id*. at pg. 5, n. 15.

52 Michael Holland & William Luking, *Executive Reorganization: An Examination of the State Experience and Article V, Section 11 of the 1970 Illinois Constitution*, 9 LOY. U. CHI. L.J. 1, 14 (1977); ACC Minutes, at pg. 2227 (Rivers, V.) ("It is also the same clause that is used in a similar manner for the reorganization powers of the President of the United States.").

53 Hogue, at pg. 34 ("As the President's reorganization authority evolved from the 1930s onward, Congress continued to delegate authority to the President while establishing provisions that sought to protect congressional prerogatives.").

54 *Id*. at pg. 3.

55 *Id*.

56 The 1949 Act would have expired in 1953 but was renewed by Congress. *Id*. at pg. 22.

57 *Id*. at pg. 20; 462 US 919 (1983).

58 Hogue, at pg. 20.

59 *Id*. at pg. 21.

60 Holland & Luking, at pg. 14.

was introduced in 1948 in the fifth edition of the National Municipal League's Model State Constitution.[61] Section 506 of the 1948 model constitution provided:

Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, offices and agencies, and it may increase, modify, or diminish the powers and functions of such departments, offices, and agencies, but the governor shall have the power to make from time to time such changes in the administrative structure or in the assignment of functions as may, in his judgment, be necessary for the efficient administration. Such changes shall be set forth in executive orders which shall become effective at the close of the next quarterly session of the legislature, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members.[62]

The model constitution's explanatory text explained that this provision gives a governor "primary responsibility for administrative organization and reorganization […]."[63] It was intended to give the "power of initiating necessary administrative changes to the executive where such changes are more likely to begin."[64] This and other provisions were intended to increase the direct accountability of the executive branch to the governor, to prevent "administrative disintegration" by "jealous legislators" and "particularist reform groups."[65]

The 1948 model constitution provided a basis for the drafters of the Alaska Constitution, and several of its recommended concepts and provisions eventually made their way into the final document, including section 506.[66] In text remarkably similar to that of the model constitution, Alaska's constitution grants to the legislature power to establish the departments, agencies and offices of the executive branch and to adjust them from time to time via legislation.[67] It also simultaneously reserves to the governor power

---

61 Benjamin & Keck, at pg. 1629.

62 Nat'l Mun. League, *Model State Constitution: With Explanatory Articles*, pg. 9-10 (5th Ed., Rev. 1948).

63 *Id.*, at pg. 24.

64 *Id.*, at pg. 32.

65 *Id.* Among the evils intended to be prevented by section 506 was the proliferation of board and commissions outside of the control of the governor. Although expert boards are supposed to be insulated from political influence, the model constitution's drafters argued that "[p]olitics is a ubiquitous thing which invades boards as readily as executive offices." *Id*. On the other hand, "focusing the responsibility on a single officer would mean less rather than more politics." *Id*.

66 Harrison, at pg. 4-5.

67 AK Const., art. III, sec. 22.

to reorganize the executive branch "for efficient administration" via executive order, subject to veto by a concurrent resolution of the legislature.[68]

Discussing this provision at the Alaska Constitutional Convention, Delegate Nordale explained that

> [w]e were thinking primarily of laws setting up boards and sort of sloppy administration, as we have at the present time. Now then, when the governor sees there are too many departments set up functioning by themselves or functioning under boards and there isn't any coordination, he has the right to suggest a reorganization and a different assignment of functions. Where his executive order might be contrary to the law which originally set up this department or board, that part of his executive order would have to be disapproved by a legislature. That is the way it works, just like the President.[69]

The delegate's comments reflect that, as in the case of the drafters of the model constitution, the drafters of the Alaska Constitution were concerned in part with the proliferation of independent agencies and boards working inefficiently and at cross-purposes.[70]

The drafters intended that sec. 23 would provide a streamlined process as an alternative to traditional legislation, as described by Delegate Londborg:

> the other way would be if the governor wanted some reorganization he would have to go to the legislature and have a bill introduced by somebody or on his own request and that bill would be acted upon to make this necessary change. For instance, deleting a certain board or ceasing its functions and putting it under the single department head or something of that nature, whatever major change he would want he would have to depend upon the legislature to pass that bill and get it into operation. Doing it this way, he sets forth an executive order but it does not become effective until it slips through the next session of the legislature without being voted out by the legislature. I suppose you could call it reverse legislation. The governor makes a new law and if the legislature does not want it done away with, well, then they can let it go through, but I think it runs in line with the strong executive

---

68 *Id*. at sec. 23.

69 ACC Minutes, at pg. 2229 (Nordale).

70 Nat'l Mun. League, at pg. 32 (Section 506 prevents "particularist reform groups from multiplying their boards").

> we have where he can set forth his changes and the legislature by being silent on it, in that way they approve of the order.[71]

In this view, the governor should not have to depend on the legislature to accomplish needed reorganization, which might not pass a bill introduced to reorganize the executive or might amend the legislation in ways the governor does not wish.[72] By using "reverse legislation," sec. 23 allows the governor to "make[] a new law" to reorganize unless the legislature takes active steps to prevent it.[73]

At the same time, the legislature's authority to establish and organize the executive branch under sec. 22 remains intact, because the legislature may veto the order by a majority vote of both houses.[74] The legislature may also undo or otherwise amend changes made in a reorganizational executive order through subsequent legislation.[75]

REORGANIZATIONAL EXECUTIVE ORDERS

Executive orders have encompassed a wide variety of restructurings, including the creation, alteration, and elimination of departments, divisions, agencies, boards and commissions, as well as numerous reassignments of functions between them. Many executive orders reassign functions within or between existing departments and agencies, without making any structural changes.[76] In some cases, governors have moved offices and

---

71 ACC Minutes, at pg. 2229 (Londborg).

72 *Id*. *See also* Harrison, at pg. 87 ("A bill would require the expenditure of time and political resources; it would require a majority vote in both houses; and in the end it might not be entirely to the governor's liking").

73 *Id*. *See also* Benjamin & Keck, at 1629 ("change occurs if the legislature does nothing").

74 ACC Minutes, at pg. 2227 (Rivers, V.) ("It does give him the power to alter existing organizational structures that have been set up by law, but only after the legislature has failed to say 'No, we won't let you do that.'"). The governor is not able to veto the legislature's veto of his order. *Id*. ("They would do it by resolution if they did not approve, and he has no veto power over a resolution."). *Accord* Benjamin & Keck, at 1629 ("if the legislature acts to block the reorganization, there is no executive override").

75 AK Const., art. III, sec. 22; *see* 2007 Op. Att'y Gen., pg. 3 (Nov. 7, File No. 663-08-0032) (Section 23 "does, not, however, prohibit the legislature under its own legislative power from later rescinding or amending laws enacted by executive order.").

76 *See, e.g.,* EO 112 (reassigning international trade functions and duties from the Department of Community and Economic Development to the Office of the Governor).

agencies between departments without otherwise changing their functions or structure.[77] Agencies have also been merged or abolished by executive order.[78] In other instances, governors have simply changed the name of a state agency.[79]

Governors have utilized their reorganizational authority to establish new principal departments, as in the case of EO 54 creating the Department of Corrections, an action upheld by the Alaska Supreme Court in *Rae*.[80] In EO 37, Governor Hammond issued an executive order to abolish the Department of Economic Development and reassign its functions to other principle departments, although he subsequently withdrew the order, evidently because substantially the same outcome was accomplished by legislation.[81]

More recently, Governor Dunleavy split the Department of Health and Social Services into two entirely new principal departments: the Department of Health and the Department of Family and Community Services.[82] In doing so, EO 121 created a new provision of Alaska law, AS 44.30.010, which established the principal executive officer of the Department of Family and Community Services.[83]

Governors have exercised reorganizational authority not only over single executive departments, but also over statutory agencies, boards and commissions. Governors have moved boards from one department to another.[84] They have reassigned their functions and

---

77 *See, e.g.,* EO 102 (moving the Office of Long Term Care Ombudsman from the Department of Administration to the Alaska Mental Health Trust Authority in the Department of Revenue).

78 *See, e.g.,* EO 53 (merging the Division of Budget and Management and the Division of Policy Development and Planning into the Office of Management and Budget within the Office of the Governor); EO 94 (eliminating the Division of International Trade and reassigned duties and functions to the Department of Commerce and Economic Development.

79 *See, e.g.,* EO 123 (changing the name of the Division of Forestry to the Division of Forestry and Fire Protection to more accurately reflect the agency's responsibilities).

80 407 P.3d at 478. Governor Hammond also created the Department of Transportation and Public Facilities by executive order. EO 39.

81 EO 37; ch. 207 SLA 1975.

82 EO 121.

83 *Id*., at sec. 36.

84 *See, e.g.,* EO 96 (reassigning responsibility for administration of the Alaska Children's Trust to a new version of the Alaska Children's Trust Board within the Office of the Governor).

duties.[85] They have eliminated boards altogether.[86] They have merged existing boards, resulting in new boards incorporating the members of the prior boards but with adjusted composition.[87] They have altered the membership of an existing board.[88]

In EO 27, Governor Egan established a new board, the State of Alaska Reconstruction and Development Planning Commission, to address the response to the earthquake of 1964. Its functions were to coordinate existing state programs established to assist in the restoration and development of the State, to present its recommendations to the Governor, and to cooperate with the federal government in accomplishing programs of restoration and development.[89]

Governor Egan's executive order also set forth the membership of the new commission.[90] The board consisted of the governor, who was also the chair, the Secretary of State, the Attorney General, the Adjutant General, the commissioners of the principal departments, and "such other representatives as [the governor] determines is necessary to provide advice and assistance in carrying out the purposes of the Commission."[91]

COMPARATIVE CASE STUDY: MICHIGAN

A 2017 study of gubernatorial reorganization authority found that in twenty-one states, the governor has significant power to reorganize the executive branch.[92] Among these, three states other than Alaska provide for gubernatorial reorganization subject to a

---

85 *See, e.g.,* EO 100 (reassigning responsibility for administration of the Authentic Native Handicraft Identification Seal program from the Department of Commerce and Economic Development to the Alaska State Council on the Arts within the Department of Education).

86 *See, e.g.,* EO 113 (eliminated the Telecommunications Information Council and reassigned its functions to the Department of Administration and the Governor).

87 *See, e.g.,* EO 71 (merging the Review Board on Alcoholism and the Advisory Board on Drug Abuse); EO 83 (merging the State Geographic Board and the Historic Sites Advisory Committee into the Alaska Historical Commission); and EO 84 (merging the Alaska Women's Commission and the Alaska Commission on Children and Youth into a new Alaska Human Relations Commission within the Governor's Office).

88 *See, e.g*. EO 109 (reassigning board seat from the Director of the Division of Alcoholism and Drug Abuse to the Commissioner of the Department of Health and Social Services).

89 EO 27, at sec. 2.

90 *Id.*, at sec. 1.

91 *Id.*

92 Benjamin & Keck, at 1630.

two-house veto: New Jersey, Michigan, and Maryland.[93] Michigan's and Maryland's gubernatorial reorganization are provided for constitutionally, while that power derives from statute in New Jersey.[94]

In Maryland, the governor's reorganizational authority is limited to the extent that certain executive offices, powers, and duties are constitutionally allocated and not subject to change via executive order.[95] New Jersey's Executive Reorganization Act also provides for certain express limitations on the governor's authority.[96] The governor may not create, transfer, abolish or merge principal departments or their functions, among other limits.[97]

Michigan's constitutional reorganization authority tracks the text of Alaska's constitution closely. As in Alaska, the executive branch is "allocated by law among and within not more than 20 principal departments … grouped as far as practicable according to major purposes."[98] The governor has the power to reorganize and reassign functions within the executive branch by executive order subject to legislative veto:

Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which the governor considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.[99]

---

93 *Id*., at 1631.

94 Mich. Const. art. V, sec. 2; Md. Const. art. II, § 24; N.J. Stat. Ann. § 52:14C-1, *et seq*.

95 Md. Const. art. II, § 24

96 N.J. Stat. Ann. § 52:14C-6(a).

97 *Id*.

98 Mich. Const. art. V, sec. 2.

99 *Id*. This section contains one express limitation not found in the Alaska Constitution. Pursuant to a 2018 amendment, Michigan's independent citizens redistricting commission is designated as a "legislative function" outside of the governor's authority. *Id*. In addition, the secretary of state, state treasurer, and attorney general are required to be heads of principal departments. *Id*. at art. V, sec. 3.

These provisions are part of a new constitution adopted by the State of Michigan in 1963.[100] A constitutional convention had been called to restructure the state government, which was "composed of so many boards, commissions, and departments that the executive branch lacked any kind of effective coordination or supervision."[101]

The Michigan legislature subsequently enacted the Executive Reorganization Act implementing this provision, including "tiers" of permissible reorganizations.[102] The Michigan Supreme Court, however, held in *House Speaker v. Governor* that while the governor "should" adhere to the statutory procedures, the constitutional provision is self-executing and the legislature lacked authority to statutorily limit the governor's constitutional authority to reorganize the executive branch.[103]

In that case, the Michigan Supreme Court was asked to decide whether the governor could abolish the legislatively created Department of Natural Resources, and transfer all of its powers and duties to a "new, gubernatorially [sic] created DNR."[104] Upholding the governor's executive order, the court held that the Michigan Constitution granted to the governor legislative power "equal" to that of the Michigan legislature with regard to organizing the executive branch.[105]

In *Morris v. Governor*, the Michigan governor reorganized the Michigan Employment Security Commission ("MESC") via executive order by transferring all of its powers and duties to the director of employment security, giving the governor power to appoint the director and the chair of MESC, and making MESC an advisory board to the director.[106] The Michigan Court of Appeals upheld the executive order.[107] The court rejected the plaintiff's argument that the governor could not alter the independent character

---

100 *Soap and Detergent Ass'n v. Natural Resources Com'n*, 330 N.W.2d 346, 352 (Mich. 1982).

101 *House Speaker v. Governor*, 506 N.W.2d 190, 194 (Mich 1993).

102 M.C.L.A. § 16.101 *et seq*.

103 *House Speaker*, 506 N.W.2d at 207-208 ("If constitutional integrity is to be maintained, the Governor must be allowed to exercise his constitutional authority to reorganize the executive branch free from interference other than a properly supported legislative veto.").

104 *Id*. at 195.

105 *Id*. at 201 ("[A]fter the initial executive branch organization, the Governor's reorganization powers are equal to the Legislature's initial and subsequent reorganization powers.").

106 *Morris v. Governor*, 543 N.W.2d 363, 364 (Mich. 1995).

107 *Id*. at 366.

of the commission established by the legislature.[108] Under *House Speaker*, the governor's powers were coequal to those of the legislature in this sphere.[109]

The plaintiff commissioners also argued that the executive order amounted to a removal without cause, in violation of another constitutional provision requiring removal for cause in certain circumstances.[110] While disputing whether that provision would apply to these commissioners in any event, the court also disagreed that reorganization could be treated as removal.[111] The court explained that the "issue involved in this case is not a mere removal, which contemplates the firing of one person and the hiring of another to fill the same position."[112] Rather, "we are faced with a reorganization where the position itself is eliminated."[113]

Next, in *Straus v. Governor*, the governor of Michigan issued executive orders transferring all statutory administrative and rulemaking powers, duties, functions, and responsibilities of the Michigan State Board of Education to the Superintendent of Public Instruction.[114] In upholding the governor's actions, the Michigan Court of Appeals labeled the governor's reorganization authority "nearly plenary."[115] The court explained:

This power includes the authority to delegate, assign, or transfer existing power, responsibility, or authority within, among, or across not more than twenty principal departments. The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself.[116]

In addition, a reorganizational executive order not disapproved by the legislature has the "status of enacted legislation […] entitled to the same presumption of constitutionality that an equivalent statute would enjoy."[117]

Unlike the MESC in *Morris*, the Board of Education was provided for in the Michigan Constitution, but the governor transferred only statutory and not constitutional

---

108 *Id*. at 365.

109 *Id*.

110 *Id*. at 366.

111 *Id*.

112 *Id.*

113 *Id.*

114 *Straus v. Governor*, 583 N.W.2d 520, 522 (Mich. 1998).

115 *Id*. at 524.

116 *Id*.

117 *Id*.

functions of the board.[118] The governor was free to redistribute powers within the Department of Education in any manner that the legislature could.[119]

Although the Michigan governor's executive orders are "nearly plenary" and "coequal" to the legislation, they are limited to reorganization and reassignment of functions within the executive branch.[120] When asked, for example, whether the governor could authorize the head of a principal department to institute an admission fee for the Michigan Historical Museum via reorganizational executive order, the Michigan Attorney General answered in the negative.[121]

The Michigan AG opined that the governor may not use a reorganizational executive order to "change substantive law that does not directly relate to the exercise of [his or] her reorganization authority."[122] The AG found no statutory authorization in existence to charge the fee.[123] Meanwhile, the legislature had expressly authorized fees in other contexts.[124] The AG concluded that the director "may neither be required nor permitted to charge an admission fee to the Michigan Historical Museum or its exhibits since that power did not exist in the basic authorizing statutes for the Governor to transfer."[125]

SCOPE OF GUBERNATORIAL REORGANIZATION AUTHORITY IN ALASKA

In establishing Alaska's executive branch, the drafters of the constitution sought to create a streamlined, efficient administration with centralized control and accountability to the governor. Their goal reflected cutting-edge constitutional theory, exemplified by the model state constitution, which emphasized the importance of a unitary executive to combat the legislature's tendency to proliferate duplicative and counter-productive agencies, boards, and commissions.

As a check on this tendency of the legislature, the constitution conferred on the governor in sec. 23 a legislative power: to reorganize the executive branch via executive

---

118 *Id*. at 527 ("[T]he board is not *constitutionally* required, as part of its function of providing leadership and general supervision over all public education, to head the Department of Education.") (emphasis in original).

119 *Id*.

120 2009 Mich. OAG No. 7239, at pg. 2.

121 *Id*. at pg. 5.

122 *Id*. at pg. 2.

123 *Id*. at pg. 4.

124 *Id*.

125 *Id*. at pg. 5.

order having the "force of law." This power does not displace the legislature but acts concurrently and coequally with it. Section 22 authorizes the legislature to allocate "[a]ll executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties […] by law." Section 23 in turn permits the governor to "make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration."

Sec. 23's grant of bounded legislative power to the governor is consistent with the Alaska Constitution's blended separation of powers. The Alaska Supreme Court has explained that the separation of powers doctrine is "descriptive of only one facet of American government" and must be considered in tandem with the "complementary doctrine of checks and balances."[126] The separation of powers is not pure or exclusive.[127] Rather, particular powers of one branch are expressly granted to another branch as a check, and it is patently not a violation of the constitution to exercise a power expressly granted.[128]

It is not, for example, unconstitutional for the legislature to confirm appointments of department heads, although appointment is an executive function, because that power is expressly delegated to the legislature in art. III, secs. 25 and 26.[129] On the other hand, it is a violation for the legislature to require confirmation for deputy department heads, because that executive power is not expressly granted to the legislature.[130]

Where the constitution confers powers of one branch on another, the task is to determine the extent of the grant.[131] Section 23 describes two distinct reorganizational powers: to make "changes in the organization of the executive branch" and "in the assignment of functions among its units."[132] This section is an express grant of legislative power to the governor, because executive orders have the "force of law."[133]

And unlike the governor's other legislative power, the veto, which is purely negative, the power to make "changes" to the "organization" of the executive branch is

---

126 *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

127 *See Soap and Detergent Ass'n*, 330 N.W.2d at 357 (separation of powers "has not been interpreted to mean that the branches must be kept wholly separate.").

128 *Id*. ("where, as in art. 5, § 2, the constitution explicitly grants powers of one branch to another, there can be no separation of powers problem.").

129 *Bradner*, 553 P2d at 7.

130 *Id*.

131 *See, e.g., Bradner*, 553 P2d at 7 (looking to secs. 25 and 26 to determine scope of legislature's confirmation power).

132 AK Const., art. III, sec. 23.

133 *Id*.

patently positive in nature.[134] The common understanding of the verb "change" indicates a power to substantively alter the organization, not merely a static power to move existing provisions or a negative power to strike them out.[135] Changing the organization of the executive branch logically includes the establishment of new executive branch units.

Yet the governor's positive legislative power under sec. 23 is bounded. The constitution "does not give the Governor the authority to create new powers or duties within the executive branch."[136] Our previous opinions have also reasoned that the governor may transfer but not eliminate functions.[137] With regard to functions, the governor is limited by the text of sec. 23 to their "assignment."[138]

In contradistinction, the governor may make any "changes in the organization of the executive branch … which he considers necessary for efficient administration."[139] The text does not place any part of the executive branch off limits or authorize the legislature to do so.[140] As discussed above, Alaska's constitution is almost entirely silent regarding the specific organizational structure of the executive, beyond authorizing its establishment by law.[141] As a result, the governor's authority to make organizational changes to the executive branch, coequal to that of the legislature, is nearly total.[142]

---

134 *See, e.g., Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 - 372 (line item veto is a negative power of limitation only).

135 *See* Miriam Webster Dictionary ("to make different in some particular: alter"). https://www.merriam-webster.com/dictionary/change. *Dunleavy v. Alaska Legislative Council,* 498 P.3d 608, 613 ("Unless the context suggests otherwise, words are to be given their natural, obvious and ordinary meaning.").

136 2009 Mich. OAG No. 7239, at pg. 2.

137 *See, e.g.,* 1983 Op. Att'y Gen., pg. 3 (May 11, File No. 366-591-83) ("Issuance of an executive order would therefore be an available option were it desirable, for example, to transfer ARC's functions to the Department of Commerce and Economic Development. However, an executive order is typically used to transfer functions, not to effect a termination of activities. To the extent that it is desired to terminate ARC's functions, legislative reform is the preferred course.").

138 AK Const. art. III, sec. 23.

139 *Id*.

140 *Id*.

141 Harrison, at pg. 87. Even Michigan's constitution requires that the secretary of state, attorney general, and state treasurer be heads of principal departments. Mich. Const. art. V, sec. 3.

142 Two exceptions are the Local Boundary Commission and the Division of Community and Regional Affairs, both of which are provided for in the Constitution. AK

As the Michigan AG reasoned, however, the governor may not "change substantive law that does not directly relate to the exercise of [his or] her *reorganization* authority."[143] Consequently, the limit on the governor's authority to make law under sec.23 is that the new law must accomplish the reorganization. Changes to law unrelated to reorganization of the executive branch are beyond the scope of an executive order and lay solely with the legislature under art. II, sec. 1.

CONCLUSION

In describing the intended scope of the governor's reorganizational power at the Alaska Constitutional Convention, Delegate Londbord described an executive order as "reverse legislation" that "makes a new law."[144] Yet, Legislative Legal Services argues that EO 128 exceeds the bounds of art. III, sec. 23 of the Alaska Constitution because it "creates new law."[145]

Leg Legal recognizes that sec. 23 grants authority to "amend statutes as necessary to reorganize the executive branch" but does not explain why the changes made by EO 128 are not necessary to accomplish the intended reorganization. Instead, Leg Legal relies on the separation of power to conclude that a court would atextually construe sec. 23 more narrowly than its plain meaning.

When examining the same language in its own constitution, however, the Michigan Supreme Court described the governor's powers as "nearly plenary" and "limited only by constitutional provisions that would inhibit the Legislature itself."[146] When acting within the sphere of organization of the executive branch, the governor is the legislature's "equal."[147] Unless disapproved by the legislature within 60 days, executive orders "ha[ve] the status of enacted legislation" and are "entitled to the same presumption of constitutionality that an equivalent statute would enjoy."[148] We believe that Alaska courts

---

Const., art. X, secs. 12 and 14. Their composition, however, is established by law. *See, e.g.,* AS 44.38.810.

143 2009 Mich. OAG No. 7239, at pg. 2.

144 ACC Minutes, at pg. 2229 (Londborg).

145 Leg Legal Memo, at pg. 4.

146 *Straus*, 583 N.W.2d at 524.

147 *House Speaker*, 506 N.W.2d at 202 (Mich 1993).

148 *Straus*, 583 N.W.2d at 524.

would also "construe the executive orders as constitutional unless unconstitutionality clearly appears."[149]

We also agree with the Michigan AG that the "[g]overnor is prohibited from using an executive reorganization order to change substantive law that does not directly relate to the exercise of [his or] her reorganization authority." In other words, the limit of the governor's legislative power to change the law, including make new law, is the extent necessary to accomplish the intended reorganization. But if the governor is unable to use new law to change the organization of the executive branch, the reorganizational component of sec. 23 is rendered a nullity, leaving only the power to move functions between existing units.

Under current law, the AEA's board of directors are the members of AIDEA's preexisting board.[150] Governor Dunleavy seeks to reorganize these public corporations by decoupling their boards. Because AEA has no existing board members currently other than the members of AIDEA's board, this reorganization cannot be accomplished without establishing who AEA's board members will be.

Consequently, EO 128 provides for the membership and appointment of AEA's new board of directors, like Governor Egan's EO 27 did in setting up the Alaska Reconstruction and Development Planning Commission. This is a change in law necessary to complete the contemplated reorganization. Without designating the board members and their manner of appointment, the board cannot be constituted. In our opinion, EO 128 constitutes an appropriate exercise of sec. 23 authority.

Sincerely,

TREG TAYLOR
ATTORNEY GENERAL

By: Parker W. Patterson
Digitally signed by Parker W. Patterson
Date: 2024.02.05 14:18:00 -09'00'
Parker W. Patterson
Senior Assistant Attorney General

PWP/fcb

Cc: Representative George Rauscher, Chair, House Energy Committee
Senators Click Bishop and Cathy Giessel, Co-Chairs, Senate Resources Committee

149 *Id*.

150 AS 44.83.030.