

EO 72

Rosswog, Smith, Taylor, VanderLeest.

30 - Armstrong, Aves, Boswell, Buckalew, Coghill, Cooper, Davis, Doogan, Emberg, V. Fischer, Gray, Hellenthal, Hermann, Hilscher, Hurley, Johnson, King, Knight, Laws, Lee, Londborg, McCutcheon, McLaughlin, McNees, Marston, Nordale, Poulsen, Riley, R. Rivers, Stewart, Sundborg, Sweeney, Walsh, White, Wien, Mr. President.

Absent: 1 - McNealy.)

CHIEF CLERK: 18 yeas, 36 nays, and 1 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 14? Mr. Ralph Rivers.

R. RIVERS: I have an amendment.

PRESIDENT EGAN: Mr. Ralph Rivers, you may offer your amendment. The Chief Clerk may read the proposed amendment.

R. RIVERS: May we have about a two-minute recess? I would like to consult with Mr. Londborg.

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for two minutes.

#### RECESS

PRESIDENT EGAN: The Convention will come to order. The Chief Clerk will please read the amendment as proposed by Mr. Ralph Rivers.

R. RIVERS: It hasn't been introduced yet, I was going to withdraw it.

PRESIDENT EGAN: No, it has not been introduced.

R. RIVERS: I won't even do that.

PRESIDENT EGAN: Are there amendments to Section 13 or 14 or 15? Mr. Sundborg.

SUNDBORG: Mr. President, I have a question about Section 14. May I be permitted to address it to Mr. Rivers?

PRESIDENT EGAN: You may, Mr. Sundborg, if there is no objection.

Start [ SUNDBORG: Mr. Rivers, I am a little bit bothered about these

executive orders of the governor which may change the assignment of functions among the departments, and I am wondering just what force they would have in law, for example, where they contravene some law that might have been passed by the legislature saying that the function of a certain department shall be thus and so and then the governor issues an executive order which says here that it will become effective at the close of the next regular legislature. What happens to the law on the books? Is it of no avail?

PRESIDENT EGAN: Mr. Rivers.

V. RIVERS: Mr. President, I am pleased to answer that question because it is one that we discussed at some length in the Committee, and in regard to organizational efficiency of the executive department, the governor would be able to recommend this change in his executive order. It would not become effective until after the legislature had reviewed it and could then take an action upon it. It is the same clause that goes along with, of course, the idea of the strong executive. It is also the same clause that is used in a similar manner for the reorganization powers of the President of the United States. 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."

SUNDBORG: Don't you feel we have to specifically give those orders the force of law in the constitution or otherwise before they could contravene an act of the legislature?

V. RIVERS: We discussed that and thought this wording would cover it by and with the advice and also discussion with more than one consultant on the matter. Occasionally there is a body within the organizational administrative setup of government where they have the power of making rules that have the force of law, and it was thought this wording covered it. Of course, none of the rules that are upset or changed, or become law are actually accepted until the legislature fails to take a positive repealing or negative action.

SUNDBORG: Would the governor have the authority, and I assume he would, to veto an act of the legislature which would undo one of these executive orders of his? If not, should we not say so?

V. RIVERS: This is a resolution, not an act. They would do it by resolution if they did not approve, and he has no veto power over a resolution. That is a joint action of the house or the two houses independent of any governor's approval in connection with resolutions as I understand it.

SUNDBORG: Does any state have a provision such as this?

V. RIVERS: I believe there are some of the newer state

constitutions, but I can't name them for you. It was generally discussed, and it was implied, and it was my understanding that there were some, and also they do have the same thing in the reorganization powers of the national government.

SUNDBORG: I don't oppose it necessarily, but I just wondered whether we have enough language to make it workable, and you are convinced we do?

V. RIVERS: Yes.

PRESIDENT EGAN: Mr. Davis.

DAVIS: I was going to try to answer Mr. Sundborg from my own standpoint. It appears to me, Mr. President, as one delegate, that if we adopt the provision which is in the proposal, then that if the legislature should make some laws which would take away the power which we here give the governor, that the laws would be unconstitutional and that we are not running into the problem Mr. Sundborg mentions because there should not be such laws.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: First a question of Mr. Victor Rivers. Mr. Rivers, don't you feel that perhaps the last sentence of the section weakens the theory of the strong executive?

V. RIVERS: In respect to the fact that the legislature would have to approve his recommendations, is that as you visualize it and is that what you are talking about?

HELLENTHAL: Yes. Recommendation in the executive field would require some sort of concurrence of the legislature.

V. RIVERS: It would require it in the case of any major change. He has the authority within his structure, no doubt, to make the minor changes necessary, but where he is going to, as it says in here, "assignment of functions and units thereof", you are going to have to have some consent of the legislature, as the Committee viewed it, and I believe I speak for the Committee unanimously on that point.

HELLENTHAL: I believe that answers my question. My point similar to Mr. Davis's, generally the executive branch of the government is supreme when acting in the executive sphere. In that sphere it cannot properly be interfered with by either the judiciary or the legislative branch. That is our true doctrine of separation of powers, and the courts have so held, but here I think we are diluting that. We are permitting an overlapping of the

legislative into the executive sphere. The normal check on a thing like this would be the court, and here we have a constitutional check in language which I agree with Mr. Sundborg is not at all clear. Perhaps an illustration of this is where the President acting properly in the executive sphere is told by Congress to do something, and the President ignores the congressional order. For instance, oftentimes the President has refused to answer a subpoena from a legislative investigating council, the theory being that the President, as executive, cannot be interfered with. But here we are enshrining a vague sort of interference.

PRESIDENT EGAN: Mrs. Nordale.

NORDALE: I just perhaps could amplify the Committee's thinking a bit on this. We 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.

PRESIDENT EGAN: Mr. Londborg.

LONDBORG: Mr. President, just another word along that line, and I think Mrs. Nordale brought it out quite clear, now 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 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.

PRESIDENT EGAN: In the absence of any amendment before us, are there amendments?

BUCKALEW: Mr. President, I have an amendment.

STATE OF ALASKA  
THE LEGISLATURE

POUCHY STATE CAPITOL  
JUNEAU, ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 13, 1989

SUBJECT: Validity of E. *Terri*  
TO: Representative Max Gruenberg  
FROM: Terri Lauterbach *Terri*  
Legislative Counsel

You have asked the following three questions relative to the validity of Executive Order No. 72, an order transferring the duties of the Medicaid Rate Commission to the Department of Health and Social Services:

- (1) Is there anything in the discussions of the the Constitutional Convention that indicates that the delegates thought the governor could act under art. III, sec. 23, Constitution of the State of Alaska, to abolish an agency?
- (2) Have any previous executive orders essentially abolished an agency by transferring all of its duties?
- (3) Are there provisions of federal law related to the medicaid program that require the existence of a commission like the Medicaid Rate Commission?

With reference to the first question, the minutes of the convention show that the constitution framers did consider the possibility of an agency being abolished by executive order. The entire section was questioned by some delegates as giving the governor too much power. Other delegates pointed out that the power to reorganize the executive branch went along with the idea they were promoting in general, that of a strong executive. Delegate Londborg then went on to describe the alternative if the governor were not given the power to reorganize the executive branch by executive order. Londborg said:

...now 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

Representative Max Gruenberg

Page 2

February 13, 1989

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 (under art. III, sec. 23), 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. (Note: the 60-day disapproval requirement was added later.) 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 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. (Emphasis added.) Alaska Constitutional Convention Proceedings, page 2229.

Londborg's discussion quoted above was not challenged in any way by the other delegates. I think it would be fair to say that the subject of abolishing an agency by an executive order had been at least alluded to with no dissension.

As to whether or not a previous executive order has attempted to abolish an agency (other than the Department of Highways and the Department of Public Works which we discussed on the telephone), I have found only one other example. Executive Order No. 37, dated January 20, 1975, would have abolished the Department of Economic Development and Planning, reassigning its functions. However, the order was withdrawn from legislative consideration by the governor on March 4, 1975. According to a revisor's note in the executive orders pamphlet, essentially the same purposes of E.O. No. 37 were accomplished by legislation in ch. 207, SLA 1975.

In response to your third question, I have not found any federal requirement that a commission like the Medicaid Rate Commission be in existence. Federal law requires only that rates be "determined in accordance with methods and standards developed by the State." 42 U.S.C. 1396a(a)(13)(A).

I hope you find this discussion helpful. I have enclosed a copy of the four pages of convention minutes that refer to

Representative Max Gruenberg

Page 3

February 13, 1989

art. III. sec. 23. The quote used in this memo comes from the fourth page, page 2229. If I can be of further assistance, please let me know.

TL:kb  
wkk1/115

Enclosure