A REPORT TO THE GOVERNOR ON SOME LEGAL IMPLICATIONS OF THE AUTHORITY OF THE COMMISSIONER OF ADMINISTRATION TO TRANSFER FUNCTIONS AND APPROPRIATIONS FROM ONE DEPARTMENT TO ANOTHER

(Art. IX, Ch. 1129, Laws 1969)

Prepared by
George A. Warp, Consultant

September 1, 1969

TABLE OF CONTENTS

FINDINGS

1. Minnesota appears to be the only state to authorize executive-initiated reorganization without the provision for some form of legislative veto. Minnesota's statute recognizes the continuing executive responsibility for effective and efficient administration and constitutes a significant landmark in state public administration.

2. Federal legislation for executive-initiated reorganization began with the Overman Act of 1918, which is similar to the Minnesota statute in that it provided only for reporting reorganizations to Congress. Since 1932, however, all of the Federal acts have contained provisions for some form of legislative veto. Virtually the entire structure of the executive branch of the Federal Government has been reshaped by changes made under the several reorganization acts.

3. At least seven of the states have executive-initiated reorganization, in all cases with provision for some form of legislative veto or approval. Generally, the state statutes have not been very effective.

4. The Minnesota statute appears to be consistent with the separation of powers doctrine set forth in Article III of the Minnesota Constitution. While it is elementary that the Legislature cannot delegate purely legislative power, the Minnesota Supreme Court has always permitted the delegation of legislative functions which are administrative or executive in nature.

5. The continuing responsibility for effective and efficient organization is recognized as administrative or executive in character (both by organization theorists and by legal authority). Thus, virtually any procedure for executive-initiated reorganization, no matter how broad in scope it might be, could withstand attack as a constitutionally permitted exception to the doctrine of separation of powers.

6. The provision for legislative veto has given legal authorities more concern than has the delegation of power to the executive. The constitutionality of the Federal acts has been questioned (though not successfully) and one state law has been invalidated because the legislative veto provision.

7. The Legislature, of course, can and will continue to make changes in the organization of the executive branch. The provision for executive-initiated reorganization permits an alternative or supplemental way of approaching the problem.

CONCLUSIONS

1. There appear to be no constitutional obstacles to the exercise by the Commissioner of Administration with the approval of the Governor of statutory authority to transfer functions, appropriations, and personnel from one department to another.

2. Through such transfers, it would appear that several departments could be abolished and their functions transferred to another department.[1] Certainly functions could be freely transferred between existing departments, even though the functions have been assigned to particular departments by statute.

3. The Legislature can and undoubtedly will continue to make changes in the organization of the executive branch.

4. The only limitation of functions which could not be transferred would appear to be the functions which are assigned in the Constitution.

5. Other limiting factors, of course, would be political expediency and organization analysis capability.

---

1. Article X of the reorganization act appears to be facilitative rather than restrictive. It is directed at the department to which functions are assigned. It does not prevent the abolition of a department and the assignment of all of its functions to another.
The language of Article IX authorizing the transfer of functions of a department to another, even though authorizing the abolition of an existing department, probably does not authorize the creation of a new department. It would seem that functions would have to be transferred to an existing department.

1. MINNESOTA'S LANDMARK STATUTE

Minnesota appears to be the only state to authorize executive-initiated reorganization without the provision for some form of legislative veto. Minnesota's statute recognizes the continuing executive responsibility for effective and efficient administration and constitutes a significant landmark in state public administration.

Article IX of the reorganization act passed by the Minnesota Legislature added to the powers of the Commissioner of Administration to transfer employees[2] and work[3] from one department to another the authority to transfer functions and appropriations of a department to another with the approval of the Governor.

> The authority of the commissioner of administration under Minnesota Statutes 1967, Section 16.13 and 16.135, includes the authority to transfer functions of a department to another with the approval of the governor. In case of transfer of function the commissioner shall determine the fractional part of the appropriation to the department from which the function is transferred for the function and that part of the appropriation is hereby reappropriated to the department assigned the function. The commissioner shall forthwith report the transfers to the committee on finance in the senate and the committee on appropriations in the house of representatives.[4]

The act recognizes the continuing executive responsibility for effective and efficient administration.[5] By delegating responsibility for the continuous reorganization of the government it enables the Governor to become truly responsible for administration and its efficiency.

Minnesota is the first state to enact such a statute with a provision for reporting reorganizations to the Finance Committee of the Senate and the Appropriations Committee of the House of Representatives, but without the legislative veto which characterizes the legislation for executive-initiated reorganization in the other jurisdictions. The statute constitutes a significant landmark in state public administration.

---

2. Laws 1939, ch. 431, art. 2, sec. 13; Minn. Stat. 1967, Sec. 16.13.

3. Laws 1965, ch. 901, sec. 66; Minn. Stat. 1967, Sec. 16.135.

4. Laws 1969, ch. 1129, art. IX. At legislative hearings in 1969, Commissioner Hatfield was asked why he had not used his powers under sections 16.13 and 16.135. His reply was that the powers were meaningless without the power to transfer appropriations.

5. Funds were appropriated in 1967 for the Governor to make a study of advisable reorganization of state government and authorizing him to appoint advisory groups or a commission to assist in such study. Pursuant to this authorization, the Governor's Council on Executive Reorganization was appointed. The Council, composed of 53 members and three ex officio members, was appointed by the Governor in January 1968. The Council's membership included leaders from business, labor, agriculture, education, and government sectors of the state.
The Council recommended that--

> The Governor should be given responsibility for initiating reorganizations within the executive branch.
> While an omnibus reorganization act or a series of reorganization bills might accomplish the current recommendations, there will undoubtedly be future problems requiring further action on executive reorganization. Some system whereby the Governor might initiate reorganizations within the executive branch in order that the administrative function could be kept both viable and dynamic is recommended.

2. FEDERAL EXPERIENCE

Federal legislation for executive-initiated reorganization began with the Overman Act of 1918, which is similar to the Minnesota statute in that it provided only for reporting reorganizations to Congress. Since 1932, however, all of the Federal acts have contained provisions for some form of legislative veto. Virtually the entire structure of the executive branch of the Federal Government has been reshaped by changes made under the several reorganization acts.

Congress gave the President his first important power to reorganize the administrative branch in January 1918, when the Overman Act[6] authorized President Wilson "to make such redistribution of functions among executive agencies as he may deem necessary." He was required only to report the changes to Congress. Under the authority given him in this statute, President Wilson issued a number of orders shifting governmental activities and groups of officials about, and set up new organizations that enjoyed the status of separate administrative agencies. While the Overman Act proved to be generally satisfactory, the authority which the President acquired was given him only for the period of the war and six months thereafter.[7]

The importance of the Overman Act lay in the recognition of the fact that when the cards were down, reorganization was fundamentally an executive responsibility. Congress could

gather information and could complain about what it found; but it could work out no way of acting which was practical, let alone constitutional.[8]

The growing emergency of the Depression won President Hoover the power to reorganize by executive order---essentially the old Overman Act authority, but with the added feature that such orders could be vetoed by resolution of either house of Congress. All 58 of the orders issued by Hoover in December 1932 were vetoed by the House of Representatives on the ground that the incoming President ought to be allowed to effect his own reorganizations.[9]

The executive reorganization acts since 1932 have all provided for some form of legislative veto---giving the reorganization authority to the President and then providing machinery whereby the Congress may approve or disapprove the plans proposed by the President. Virtually the entire structure of the executive branch has been reshaped by changes made under the several reorganization acts.[10]

---

6. 40 Statutes at Large 556 (1918).

7. Charles S. Hyneman, Bureaucracy in a Democracy (1950), pp. 108-09.

8. Barry Dean Karl, Executive Reorganization and Reform in the New Deal, the Genesis of Administrative Management, 1900-1939 (1963), p. 190.

9. Ibid.

10. Senate Subcommittee on Executive Reorganization, Hearing, March 29, 1969 (statement of Harold Seidman, Assistant Director of the U. S. Bureau of the Budget), p. 8.

3. EXPERIENCE OF OTHER STATES

At least seven of the states have executive-initiated reorganization, in all cases with provision for some form of legislative veto or approval. Generally, the state statutes have not been very effective.

At least seven of the states now have provision for executive-initiated reorganization, in all cases with the provision for some form of legislative veto or approval. States with current provisions include Alaska,[11] Georgia,[12] Kentucky,[13] Massachusetts,[14] Michigan,[15] Pennsylvania,[16] and South Carolina.[17] Oregon[18] and Puerto Rico[19] have had provisions in effect for limited periods of time. New Hampshire[20] had such a provision, but it never went into effect.

Generally, the state provisions have not been very effective. A study made in 1966 concluded that states without executive-initiated reorganization had done as well as those that had it, and some had done a great deal better. Apparently the disappointing experience resulted from the prevailing legislative suspicion of and resentment toward a procedure that reverses the usual executive and legislative roles. In the face of such hostility, the chief executive as often as not has abandoned both the procedure and the cause of reorganization.[21]

Alaska has made some use of the procedure since its reorganization act of 1959, which reorganized the executive

branch in conformity with the constitutional requirement that there be no more than 20 principal departments. Since 1959, the executive reorganization plan procedure has been utilized to establish a Department of Highways and a Department of Economic Development and Planning, and to accomplish other less ambitious reorganizations. No plan submitted during the first six years received legislative disapproval.[22]

---

11. Constitution of 1956, Art. III, sec. 23.
12. Act 628 of 1960.
13. 1960 Acts, ch. 68; 1962 Acts, ch. 106.
14. Constitutional Amendment, 1966.
15. Constitution of 1963, Art. V, sec. 2.
16. Act 8 of 1955 (P.L. 23, 1955).
17. Act 621 of 1948.
18. Laws 1959, ch. 501.
19. Act 140 of 1949; Act 1 of 1950.
20. 1949 Sess. Laws, ch. 43.
21. Lynn W. Eley, The Executive Reorganization Plan: A Survey of State Experience (1967), pp. 26-27.
22. Ibid., pp. 27-28.

4. DELEGATION OF POWER TO REORGANIZE

> The Minnesota statute appears to be consistent with the separation of powers doctrine set forth in Article III of the Minnesota Constitution. While it is elementary that the legislature cannot delegate purely legislative power, the Minnesota Supreme Court has always permitted the delegation of legislative functions which are administrative or executive in nature.

The authority of Congress to delegate reorganization authority to the President has never been successfully challenged in a court test. The question of the legality of the delegation by the Congress of the power to the President to reorganize the executive branch of the government has been resolved not only by various Congresses[23] but also by the courts[24] and by the opinions of the Attorney General.[25]

Similarly, there does not appear to be any serious impairment to the ability of a state legislature to enact a statute consistent with the separation of powers doctrine, yet providing the Governor complete authority for reorganization, or to give this power to the Commissioner of Administration to be exercised with the approval of the Governor.[26]

Article III of the Minnesota Constitution contains the statement of the separation of powers doctrine.

> The powers of government shall be divided into three distinct departments--legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise

any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution.

In 1949, in Lee v. Delmont,[27] the Minnesota Supreme Court said that

> It is elementary that the legislature--except where expressly authorized by the constitution, as in the case of municipalities---cannot delegate purely legislative power to any other body, person, board, or commission. Although purely legislative power cannot be delegated, the legislature may authorize others to do things (insofar as the doing involves powers which are not exclusively legislative) which it might properly, but cannot conveniently or advantageously, do itself. It does not follow that, because a power may be wielded by the legislature directly, or because it entails an exercise of discretion or judgment, that it is exclusively legislative.
>
> Pure legislative power, which can never be delegated, is the authority to make a complete law.... Legislation must often be adapted to complex conditions involving a host of details which the legislature cannot deal directly.... The policy of the law and the standard of action to guide the administrative agencies may be laid down in very broad and general terms.

In 1951, the Minnesota Supreme Court, in Hassler v. Engberg,[28] expanded its views on the delegation issue.

> While the legislature cannot delegate legislative power it may delegate legislative functions which are merely administrative or executive. It may confer upon officials, commissioners, or boards with administrative powers. The legislature has a large discretion in determining the means through which its laws shall be administered....
>
> A statute to be valid must be complete as a law when it leaves the legislature.... The legislature may delegate... the power to do some things which it might properly but not advantageously do itself.... The law making power has been fully exercised. What is left is for executive power, which must proceed upon the conditions and in the manner declared by the law. In that is nothing strange or offensive to constitutional restrictions.

The standards set forth in the statutory provisions--"eliminate duplication," "promote economy and efficiency"--, while broad and general, appear to be adequate.[29]

---

23. The Overman Act of 1918 and a series of reorganization acts beginning in 1932 have delegated to the President the power to initiate reorganizations of the executive branch of the government.

24. See Isbrandtsen-Moller Co. v. U. S., 14 F. Supp. 407 (3-judge dist. ct., SDNY, 1936), affirmed on other grounds in 300 U. S. 139 (1937); Swayne & Hoyt v. U. S., 18 F. Supp. 25 (3-judge dist. ct., D.C., 1936), affirmed on other grounds in 300 U. S. 297 (1937); Sibbach v. Wilson & Co., 312 U. S. 1 (1941).

25. 37 Ops. Atty. Gen. 56, 63-64 (1937) (opinion of Attorney General Mitchell, Jan. 24, 1933); Memorandum from the Attorney General to Sen. McClellan, Mar. 17, 1949, Committee on Government Operations, Sen. Rep. 232, 81st Cong., 1st Sess., p. 19.

26. The Department of Administration was intended to be the general management arm of the Governor, with powers and duties respecting all agencies of the state. The Governor has direct and continuous administrative relationship with the Department, as, for example, in the preparation of the biennial budget.

27. 228 Minn. 101, 112-14 (1949).

28. 233 Minn. 487, 498, 515, 517-18 (1951).

29. Williams v. Evans, 139 Minn. 32 (1917); Dimke v. Finke, 209 Minn. 29 (1940); State ex rel. Railroad and Warehouse Commission v. Chicago, Milwaukee & St. Paul Ry. Co., 38 Minn. 281 (1888); State ex rel. Beek v. Wagener, 77 Minn. 483 (1899). Kenneth C. Davis, the nation's leading authority on administrative law, maintains that the standards test is essentially empty of meaning today and should be eliminated in favor of a test of reasonableness under each set of circumstances. Davis, Treatise on Administrative Law, Vol. I, sec. 2.05 at p. 99, sec. 2.08 at p. 108, and sec. 2.15 at p. 151. Also see Nutting, "Congressional Delegations Since the Schechter Case," 14 Mississippi Law Journal 350, 357 (1942). But see "State Statutes Delegating Legislative Power Need Not Prescribe Standards," 14 Stanford Law Review 372-79 (Mar. 1962).

5. REORGANIZATION AN EXECUTIVE FUNCTION

> The continuing responsibility for effective and efficient organization is recognized as administrative or executive in character both by organization theorists and by legal authority. Thus, virtually any procedure for executive-initiated reorganization, no matter how broad in scope it might be, could withstand attack as a constitutionally permitted exception to the doctrine of separation of powers.

Reorganization is an administrative or executive function. The structure of administration relates more closely to the execution of the law than it does to the determination of policy (even though execution and policy determination are interwoven.

The President's Committee on Administrative Management, in its report in 1937, recognized the continuing executive responsibility for efficient organization.

> The division of work for its effective performance is a part of the task of doing that work.... To render the executive truly responsible for administration and its efficiency, he must be required to accept the responsibility for the continuous administrative reorganization of the Government.[30]

Chester I. Barnard in his classic work on The Functions of the Executive includes the "scheme of organization" as part of the executive functions.[31] Luther Gulick includes "organizing" as an essential part of the work of the executive.[32] Pfiffner and Presthus, in their widely-used textbook on public administration, include the reorganization power as one of the executive's principal devices for carrying out executive

control.[33] Dimock and Dimock, in their textbook, refer to "organization as a tool of management"--the basic tool by means of which the administrative process is kept operating.[34] John D. Millett treats "organization as a technical problem"--one of the four basic problems of management.[35] Emmerich refers to reorganization as a continuing process with the executive as its focal point.[36] And Victor A. Thompson maintains that organization is almost universally designated as an "executive function."[37]

The United States Congress and the Minnesota Legislature have treated reorganization as an administrative or executive function in their delegations of reorganization power to the President and to the Commissioner of Administration and Governor, respectively.[38] United States Attorneys General, in at least two expressions of opinion, have considered the reorganization power to be administrative or executive in nature.[39]

Changes in the structure of government that do not alter basic policy should be accomplished in a more flexible manner than is afforded by the process of enacting statutes so that they can take effect as early as possible.[40] The administrative structure of the executive branch of the Minnesota State Government has not kept pace with the rapid changes in social and economic conditions so as to most efficiently and economically meet the needs of its citizens for government services. Executive-initiated reorganization can provide a more responsive and efficient means for undertaking needed changes in the organization of the executive branch. Virtually any procedure

for executive-initiated reorganization, no matter how broad in scope it might be, could withstand attack as a constitutionally permitted exception to the doctrine of separation of powers.

---

30. Administrative Management in the Government of the United States (January 1937), p. 36.

31. (1938), p. 219.

32. Luther Gulick and L. Urwick, Papers on the Science of Administration (1937), p. 13.

33. John M. Pfiffner and R. Presthus, Public Administration (5th ed. 1967), p. 517.

34. Marshall E. Dimock and G. O. Dimock, Public Administration (3rd ed. 1964), p. 179.

35. John D. Millett, Management in the Public Service (1954), ch. 7.

36. Herbert Emmerich, Essays on Federal Reorganization (1950), p. 7.

37. Victor A. Thompson, Modern Organization (1963), p. 84.

38. See supra, footnot[illegible]2, 3, 4, 6, and 23.

39. See supra, footnot[illegible]35.

40. At the Workshop on Minnesota Government which was held at the University of Minnesota in Ju[illegible]1968, Senator Gordon Rosenmeier expressed the view tha[illegible]organization should be a piecemeal or continuing proc[illegible] rather than a comprehensive, all-at-one-time pr[illegible]ss. Also see supra, footnote 5.

6. LEGISLATIVE VETO

> The provision for legislative veto has given legal authorities more concern than has the delegation of power to the executive. The constitutionality of the Federal acts has been questioned (though not successfully) and one state law has been invalidated because of the legislative veto provision.

The provision for legislative veto has given the courts more concern than has the delegation of the power to initiate reorganizations.

Attorney General Mitchell in 1933 took the position that the functions of the President under the reorganization acts were executive in their nature and hence could constitutionally be delegated. However, he was of the opinion that the attempt to give to either house of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity of the entire provision.[41]

In 1949, the Attorney General disagreed with the 1933 opinion as based upon an unsound premise, namely, that the Congress in disapproving a reorganization plan is exercising a legislative function in a nonlegislative manner.

> But the Congress exercises its full legislative power when it passes a statute authorizing the President to reorganize the executive branch of the government by means of reorganization plans. At that point Congress decides what the policy shall be and lays down the statutory standards.... If the legislation stops there, with no provision for further reference to the Congress, the President's authority to

> reorganize the government is complete.... The authority given to the President to reorganize the Government is legally and adequately vested in the President when the Congress takes the initial step of passing a reorganization act.
>
> The serious question concerns the reservation by the Congress of authority to disapprove action taken by the President under the statutory grant of authority. ... This is merely a case where the President and Congress act in cooperation for the benefit of the entire Government and the Nation.
>
> The President, in asking Congress to pass a reorganization bill, is taking the position that if the Congress will delegate to him authority to reorganize the Government, he will undertake to submit all reorganization bills to the Congress and to put no such plan into effect if the Congress indicates its disapproval thereof. In this procedure there is no question of Congress taking legislative action beyond its initial passage of the reorganization act.[42]

In an advisory opinion, the New Hampshire Supreme Court held unconstitutional the reorganization act which provided for legislative veto of reorganization plans within 25 days by concurrent resolution. The Court was of the opinion that, while the delegation of power to the Governor was not unconstitutional, legislative action on the plans would have to follow the regular procedure for passing of laws. Therefore, the provision for legislative veto of the reorganization proposals made by the Governor was unconstitutional.[43] The New Hampshire Court took much the same attitude as Attorney General Mitchell did in 1933.

---

41. 37 Ops. Atty. Gen. 56, 63-64 (Jan. 24, 1933).

42. Memorandum from the Attorney General to Sen. McClellan, Mar. 17, 1949, in Committee on Government Operations, 81st Cong., 1st Sess., Sen. Rep. No. 232, pp. 19-20.

43. Opinion of the Justices, 96 N. H. 517 (1950).

7. CONTINUING ROLE OF THE LEGISLATURE

The Legislature, of course, can and will continue to make changes in the organization of the executive branch. The provision for executive-initiated reorganization permits an alternative or supplemental way of approahcing the problem.

The Senate Committee on Government Operations, in a 1949 report, concluded that

> experience has demonstrated that substantial progress in reorganizing the executive branch can come about only under general authorizing legislation enacted by the Congress. The Congress, of course, has made and will make selected changes in the organization of the executive branch, but as many members of Congress have stated, it is not feasible to enact far-reaching changes in the organizations permeating widely through the executive branch by means of direct legislation affecting specific agencies.[44]

The reorganization act permits an alternative, or supplemental way of approaching the probl , and it does so by clearly placing the responsibility for initiating improvements upon the executive.

The President's Committee on Administrative Management argued that

> the Executive should always be held responsible not alone for the management of the executive departments, but also for the division of work among the major departments....
>
> This places in the Congress the settlement of broad policy, and on the President the executive task of reorganization in accordance with this policy. This retains in the hands of Congress not only complete control over the things which are to be done by

Government, that is, over policy, but also, first, the opportunity to review the effectiveness of the reorganization each year when the Budget comes before it; second, the means for holding the Executive accountable through the independent audit; and, third, the continuing opportunity and duty of investigating those phases of government and administration which the Congress or the public feel are in need of review.[45]

---

44. U. S. Cong., Sen. Committee on Government Operations, Report to Accompany H. R. 3496: Extending the Reorganization Act of 1949, 88th Cong., 2nd Sess., p. 5.

45. Administrative Management in the Government of the United States (1937), p. 36.