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TO: Members of State Boards and Commissions Subcommittee

FROM: Senate Counsel Division - Thomas J. Triplett

SUBJ: Authority of the Governor to Promulgate Executive Orders

The Chairman of the Subcommittee requested that I draft legislation which would place restrictions on the Governor's creation of boards and commissions by executive order. Before doing this, however, it seemed to me appropriate to briefly outline some of the constitutional questions surrounding the use of executive orders. The long-recognized history of executive order use and a series of court decisions upholding the ability of the executive to use this authority raise some question as to the ability of the Legislature to impose restraints on this activity.

Unfortunately, there is very little in the way of Minnesota statutes, case law, or Attorney General's opinions speaking to this question. Therefore, I will make frequent reference in this memorandum to the executive order authority of the President, a field which is more adequately analyzed in case law and comment. References in this memorandum to recent use of executive orders by Minnesota governors are from data compiled by Bob Renner of Senate Minority Research.

1. Historical Background. In the past 30 years, Minnesota governors have issued 258 "executive orders." The majority of these orders have been issued pursuant to the specific powers of the Governor as set forth in Article V, Section 3 of the Constitution. The use of the executive order has risen dramatically from a total of two issued during the three terms of Governor Youngdahl to 122 through October 3, 1975, of Governor Wendell Anderson's terms. Forty of Governor Anderson's executive orders create boards, commissions or other similar agencies.

Presidential executive orders have been issued since the founding of the Republic. Similar to the Minnesota history, the frequency of presidential executive orders has increased dramatically over the years. Since 1907, when executive orders first began to be numbered, almost 12,000 have been issued by Presidents. The vast majority of these presidential executive orders relate to routine administrative matters of the Office of the President and do not result in conflicts with the legislative branch.

2. Sources of the authority to issue executive orders. There are three primary sources of the authority to issue executive orders: precise constitutional language, legislatively delegated powers and duties, and implied powers of the executive. Article V, Section 3 of the Minnesota Constitution states the basic powers of the governor:

> "Sec. 3. The governor shall communicate by message to each session of the legislature information touching the state and country. He is commander-in-chief of the military and naval forces and may call them out to execute the laws, suppress insurrection and repel invasion. He may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to his duties. With the advice and consent of the senate he may appoint notaries public and other officers provided by law. He may appoint commissioners to take the acknowledgment of deeds or other instruments in writing to be used in the state. He shall take care that the laws be faithfully executed. He shall fill any vacancy that may occur in the offices of secretary of state, treasurer, auditor, attorney general and the other state and district offices hereafter created by law until the end of the term for which the person who had vacated the office was elected or the first Monday in January following the next general election, whichever is sooner, and until a successor is chosen and qualified."

There is little question that the governor may use the vehicle of executive order to carry out the specific powers enumerated in this section of the Constitution. The governor probably does not need to resort to the formal mechanism of the executive order in order to carry out these functions, but tradition seems to suggest that cloaking an executive action in the form of an "Executive Order" lends an additional credence and "respectability" to the action.

The second source of authority for use of the executive order is a specific grant of statutory authority by the Legislature. Although the Legislature has often granted the governor the authority to implement a law in the

manner he sees fit, seldom has this authority been granted by referring specifically to executive orders. (One of the few examples in statutes of specific reference to "executive order" is Minnesota Statutes, Section 124.62, Subdivision 1, which gives the governor the power to accept by executive order on behalf of the state provisions of federal law relating to aid to education.) Whether or not the statute calls for the use of executive orders, their use would be appropriate - albeit perhaps unnecessary - in carrying out the mandate of a legislative delegation of authority.

The third source for executive orders is an implied authority of the governor to issue executive orders in order to fulfill his executive responsibilities. It is this third source of authority which causes the most problems from a constitutional perspective since the Minnesota Constitution contains no specific reference or recognition of any inherent right of the governor.

3. Constitutional Issues. There is little doubt that the governor may constitutionally issue executive orders pursuant to the first source of authority listed above. If a power or duty is granted the governor under Article V, Section 3, he must be presumed to have the Constitutional authority to execute that power or duty in a reasonable manner.

In most cases the second source of authority also poses no constitutional problems. A few older court decisions have held that certain grants of legislative authority were unconstitutional delegations. That is, a grant of authority was sometimes held to be so broad that the executive in fact became a legislating entity. (See the Depression-era United States Supreme Court decisions of Panama Refining Company v. Ryan, 293 U.S. 388 (1935), and Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).) The Minnesota Supreme Court adopted a similar approach on the delegation of powers issue in its decision in State ex. rel. Lichtscheidl v. Moeller, 189 Mn. 412, 249 N.W. 330 (1933). This case concerned the ability of the governor to issue an executive order prohibiting the foreclosure of certain mortgages during the Depression. In concluding that the governor's actions went beyond the valid exercise of executive power, the Court reasoned as follows:

> With all due respect to the governor's great power to see that the laws of the state are faithfully executed, he is not vested with any legislative power, and no such power can be conferred on him by the legislature. As governor he can enforce the laws but cannot change or suspend them. (189 Mn. at 420.)

This theory on the limitation of the executive order authority was restated in attorney general opinions to the governor dated July 1, 1946, November 2, 1946, and October 4, 1950.

Recent trends in the field of administrative law appear to have loosened this strict interpretation of constitutional delegation of powers. This trend is exemplified by the fact that no federal or Minnesota delegation of powers to the executive has been struck down since the Schechter and Moeller decisions. (W. Hebe, "Executive Orders and the Development of Presidential Power," 17 Villanova Law Review 688 (1972).) Recent federal court decisions have simply required that the delegation of power to the executive be precise enough so as to enable Congress, the courts, and the public to ascertain whether the executive has conformed to the standards stated in the legislative delegation. (Yakus v. United States, 321 U.S. 414 (1944).)

As I suggested above, the most troublesome source of authority for the issuance of executive orders is the third source - an implied power in the executive. Under Article V, Section 3, the governor "shall take care that the laws be faithfully executed." To accomplish this goal, the governor must presumably be given a substantial amount of administrative discretion. The issue, however, is how far can the governor go in initiating policies and procedures which are perhaps not the subject of specific legislation. The following three hypothetical executive orders demonstrate the problem:

1. The governor creates a new office or board to administer a program which the legislature has funded or otherwise recognized in statute, but for which the legislature has not designated an office or agency to administer the program.

2. The governor creates a new office or board to administer a program which the governor has initiated and upon which the legislature has taken no position.

3. The governor creates a new office or board to administer a program which the governor desires to implement but upon which the legislature specifically decided against implementing.

Several federal court decisions have concluded that hypothetical No. 3 above is an unconstitutional exercise of executive authority. The most famous case upholding this position is Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952). In this case the U. S. Supreme Court held that President Truman did not have authority to nationalize steel mills during the Korean conflict. The Congress had considered the issue and specifically decided against

that course of action. Therefore, the Court reasoned, for the executive to overturn this policy decision of the legislature would be to usurp legislative authority and thereby result in a violation of the constitutional principle of separation of powers.

The first hypothetical posed above also is easily answerable. Since the executive has the function of executing the laws, if the legislature does not prescribe a specific means for administering one of its programs, the executive must - by default, if for no other reason - prescribe a method for administration. If this method prescribed by executive order is not contrary to any other statute, the courts will presumably uphold the executive order as a valid exercise of the governor's powers and duties.

The second hypothetical posed above causes the most difficulty. That is, in what instances may the governor act by executive order even though the legislature has not taken a position either for or against the program? Neither Minnesota law nor federal law provide a definite answer on this question. Several federal cases appear to suggest that it is permissible for the executive to act under hypothetical No. 2 if the legislature was aware of prior similar executive actions in the area and if the actions were not contrary to any specific legislative action. (Hebe, supra at 698-702.) On the other hand, there does not appear a clear precedent which would establish the legality of an executive order which is not founded upon specific statutory authority or a past history of legislative acquiescence to executive actions.

The recent trend which accepts the idea of a powerful executive would permit wide discretion in the governor for the issuance of executive orders. On the other hand, the Moeller decision appears to say, in Minnesota at least, that there must be some statutory basis for the issuance of an executive order. Because of these conflicting trends and prior decisions, I am unable to guess a court's interpretation of the legality of an executive order issued under the second hypothetical.

4. Ability of the Legislature to Restrict the Use of Executive Orders. The discussion in this memorandum so far has focused upon the ability of the governor to issue executive orders. The corollary to this discussion, and the basic question at issue before the Subcommittee, is the degree of restriction that the legislature can place on the issuance of executive orders. The prior discussion suggests that where the governor has issued an executive order in respect to one of his enumerated powers in Article V, Section 3, of the Constitution, the legislature may very well be precluded - because of the separation of powers doctrine - from restricting the substance of the executive

order. Conversely, the legislature would be able to impose restrictions on the issuance of executive orders which are based upon legislative delegations of authority or the implied powers of the executive. Thus, the legislature would be able to statutorily restrict the issuance of executive orders which relate to the creation of boards and commissions. In my opinion, it would be permissible for the legislature to prescribe by law that all boards and commissions created by executive order shall:

1. Be named according to a common nomenclature scheme (e.g., Governor's Committee on . . .),

2. Have no more than _____ members,

3. Expire on _____,

4. Pay compensation to the members of $_____ per day plus expenses, and other similar provisions.

In addition, it would seem to me to be permissible for the legislature to prescribe certain procedures in the issuance of executive orders. These procedures could include a filing requirement with the Secretary of State, a standard form for the executive order, a numbering and indexing system, and a reporting requirement to the legislature.

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