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ATTORNEY GENERAL OPINION NO. 80- 140

Joseph E. King, Director
Kansas Energy Office
214 W. 6th Street
Topeka, Kansas 66603

Re: State Departments; Public Officers, Employees--
Office of Governor--Power to Accept Delegated
Presidential Authority

Synopsis: Even though the president of the United States may have authority to delegate powers and duties to the governor, the president has no constitutional power to compel the governor's acceptance of such delegation. Moreover, under our constitutional form of government, the governor has no inherent power separate and apart from our state's constitution, and the authority of the governor must be derived from the specific grants of power to the governor in the constitution and in the laws duly enacted by the legislature thereunder. Thus, as respects powers and duties delegated to the governor by the president, the governor's ability to accept such delegation is dependent upon the existence of specific constitutional or statutory provisions providing such authority, or upon such authority as is to be reasonably and necessarily implied therefrom. Cited herein: Kan. Const., Art. 1, §§3,7; 15 U.S.C.A. §§751 et seq., 42 U.S.C.A. §§8501 et seq.

* * *

Dear Mr. King:

You have requested our opinion regarding the constitutional power of the Kansas governor to accept authority delegated to him by the president of the United States. Your interest in this proposition arises as a result of recent federal legislation in the field of energy conservation, wherein powers conferred on the president may be delegated to the governors of the various states.

By way of example you have directed our attention to Executive Order 12140 (as amended by Executive Order 12160), which relies, in part, on the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159; 15 U.S.C.A. §§751 et seq.) for its efficacy, and you have also referred to provisions of the Emergency Energy Conservation Act of 1979 (P.L. 96-102; 42 U.S.C.A. §§8501 et seq.). In your letter, you explain the foregoing, as follows:

> "The executive orders delegate authority to Governors and other Chief Executive Officers to implement certain gasoline conservation measures, including odd-even sales restrictions, minimum purchase requirements, business hour regulation for service stations, and designation of priority end users.
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> . . . .
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> "Under Section 212 of the act [EECA], Governors are permitted to request and receive delegated authority to implement emergency conservation measures, not specified in the act, if certain conditions are met. Among these is a requirement for finding by the state's Attorney General that the requesting Governor does not have state authority to implement the proposed measures, that state law does not prevent the Governor from accepting the delegation of authority, and that implementation of the measures would not be contrary to state law."

Since the governor of Kansas acts by and through the Kansas Energy Office with respect to energy conservation and other similar energy-related matters, you have sought our advice as to the limits of the governor's authority in accepting any powers delegated by the president. Since you have not apprised us of any specific instances of delegated power that may have prompted your inquiry, we assume that your request anticipates a general response from us as to the principles of law involved in the delegation of presidential powers and the acceptance thereof by the governor. Thus, it is to this objective we have directed our efforts.

It would appear that there are two basic issues presented by your inquiry: (1) Can the president impose duties upon the governor; and (2) can the governor willingly and voluntarily accept powers and duties delegated by the president? With respect to the first issue, we believe that Kentucky v. Dennison, 24 How. 66, 16 L.Ed. 717 (1860), provides the answer. In writing for a unanimous court,

Mr. Chief Justice Taney stated:

> "[We] think it clear that the Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state.'
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> "It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal." 24 How. at 107, 108, 16 L.Ed. at 729.

The foregoing was quoted and relied upon recently in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 678, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). In a footnote to the decision in Monell, the Court also quoted from Chief Justice Taney's concurring opinion in Prigg v. Pennsylvania, 16 Pet. 539, 10 L.Ed. 1060 (1842), regarding a congressional act implementing the so-called Fugitive Slave Clause:

> "'The state officers mentioned in the law [of 1793] are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it.' 16 Pet, at 630, 10 L.Ed. 1060 (Taney, C.J., concurring in part)." 436 U.S. at 677, 56 L.Ed.2d at 627, 98 S.Ct. at 2029.

In our judgment, therefore, the foregoing authorities make it clear that the federal government has no constitutional authority to coerce the action of a state officer in his or her capacity as a state officer. Thus, even though the president may have authority to delegate powers and duties to the governor, the

president has no constitutional power to compel the governor's acceptance of such delegation.

While not persuasive of our opinion in this regard, we note with interest that the U.S. Department of Justice is in apparent agreement with our conclusion. During the course of our researching this proposition, we obtained a copy of a May 6, 1979 memorandum prepared for former Secretary of Energy, James R. Schlesinger by Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, who analyzed delegation of power, both under the EPAA, and inferentially, as a general constitutional issue. The pertinent portions of his arguments follow:

> "For reasons stated hereafter, we conclude that delegation of specific powers to the Governors on a permissive basis would clearly be valid and constitutional except in situations in which the statutory or constitutional law of a State operated to prevent exercise of such federal powers by the Governors and that the substantive powers proposed to be delegated to the Governors would appear to be authorized by the EPAA.
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> . . . .
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> ". . . The only substantial question raised by the proposed delegation relates to the impact it might have on the sovereign status of the States in our federal system. Cf. National League of Cities v. Usery, 426 U.S. 833 (1976)
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> "The salient feature of the proposed delegation as regards the Tenth Amendment is that each Governor will be free to decline such delegation for any or no reason at all. Thus, unlike the situation initially presented to the Supreme Court in the case of Environmental Protection Agency v. Brown, 431 U.S. 99 (1977), the executive branch of any State is completely free to accept or reject the responsibilities attendant to any delegation of federal power by the President. Given the permissive nature of the delegation, we do not believe that the concerns expressed by the several Courts of Appeals regarding the Tenth Amendment implication of the Clean Air Act and that Act's imposition of certain duties on the States regarding its implementation are present here. See, e.g. Brown v. Environmental Protection Agency, 521 F. 2d 827, 837-42 (9th Cir., 1975), judgment vacated, 430 U.S. 99 (1977). In that

> case, the 9th Circuit suggested quite strongly that a federal statute requiring a State to expend state funds and utilize state personnel to enforce certain provisions of the Clean Air Act would present substantial Tenth Amendment problems. We do not believe that the voluntary assumption of such federal responsibilities by state officers stands on the same footing as the mandatory requirements of the regulations issued by the Environmental Protection Agency pursuant to the Clean Air Act. . . .
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> "Where, however, the executive authority of a State is explicitly prohibited by state statutory or constitutional law from assuming such functions, we doubt that a Governor can accept a delegation to perform these federal functions. The threshhold inquiry in such a situation is whether Congress would have intended any state statutory or constitutional provisions contrary to such delegation to be preempted by the EPAA. Section 6(b) of that Act, 15 U.S.C. §755(b), deals specifically with the subject of preemption, but does not suggest a Congressional intent to preempt the kind of state statutes which would be involved here. Because the control of a State's executive branch by its legislature, including the devotion of state officers to duties other than those prescribed by the state legislatures, appears to us to be a fundamental aspect of state sovereignty under the Tenth Amendment, we believe that the EPAA should not be read, and probably cannot be read, to effect such preemption. We think that the specificity of the preemption provision contained in the EPAA, which clearly does not contemplate the kind of preemption involved here, coupled with the substantial question that would be presented were the EPAA read to preempt such state law, would be decisive of this point." (Footnotes omitted.) (Emphasis added.) Id. at pp. 1-3.

It is also to be noted that in footnote 3 to the foregoing, the author states:

> "The substantiality of the constitutional question that would be presented is, we believe, apparent under all of the Courts of Appeals decisions which were consolidated for review in the Supreme Court in Environmental Protection Agency v. Brown, supra.

> Certainly the requirement that the Governor of a State perform federal duties is one which could detract substantially from his ability to perform state duties imposed on him by state law. Indeed, it is difficult to conceive of a more significant infringement on state authority than to conscript the Governor of a State, even a willing Governor, into the federal service in contravention of state law which reserves the services of the Governor to the people of his State." (Emphasis added.)

We also note that the cases we have cited or quoted above, and upon which we relied for our conclusion as to the president's authority, provide insight as to the answer to the second issue, i.e., whether the governor may willingly and voluntarily accept powers and duties delegated by the president. As alluded to in these referenced authorities, we believe that the governor's ability in this regard is, for the most part, dependent upon the will of the legislature.

In your letter of request, you made reference to a prior opinion of this office, Attorney General Opinion No. 78-104, which was requested by your predecessor, Mr. Steven D. Harris. As noted in that opinion, Mr. Harris requested information concerning the

> "powers which are vested in the governor under K.S.A. 1977 Supp. 74-6806 and -6807, under other express statutory or constitutional provisions or under the inherent power of the office to protect the public health, safety and welfare, in the event it is deemed necessary to implement particular mandatory actions, such as moving persons from affected areas, allocating available fuel supplies within the state, and restricting hours of nonessential businesses." Id. at 3.

In responding to this request, Attorney General Schneider concluded:

> "I find nothing in the state constitution to support a conclusion that the governor enjoys any inherent constitutional powers to adopt and enforce such measures as described above. Article 1, §3 provides that the 'supreme executive power of the state shall be vested in a governor, who

> shall be responsible for the enforcement of the laws of this state.' Under Article 8, §4, the governor is the commander in chief of the state militia, and 'shall have power to call out the militia to execute the laws, to suppress insurrection, and to repel invasion.' There is no inherent power in the office of the governor other than that expressly granted by the constitution or statutes of the state or that which is expressly or reasonable to be implied therefrom. I find nothing in the state constitution which vests in the office of governor any general executive power to respond to the needs of an energy emergency as described above." Id. at 4.

Although no authority was offered in support of the foregoing conclusion, we believe it to be a correct statement of applicable legal principles. "It is fundamental that our state constitution limits rather than confers powers." State ex rel., Schneider v. Kennedy, 225 Kan. 13, 20 (1978). Moreover, as stated in Manning v. Davis, 166 Kan. 278 (1948):

> "It is well settled that under our theory of government all governmental power is vested in the people. Normally, our federal constitution is looked upon as a grant of power, though it contains some limitations upon the powers of the states. But it specifically provides:
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> "'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' (Ninth amendment.)
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> "'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' (Tenth amendment.)
>
> "Our own constitution contains the following:
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> "'All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. . . .' (Bill of Rights, sec. 2.)
>
> "'This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.' (Bill of Rights, sec. 20.)
>
> "Normally the people exercise their governmental powers

> through the legislature. Hence, the people, through their legislature, may exercise any governmental power which they have not given up to the federal government, or which they have not restrained themselves from using by their own constitution." Id. at 280, 281.

Although not stated in precise terms, we find the foregoing statements of the Kansas Supreme Court support the conclusion that there is no inherent power in the governor separate and apart from the constitution, and the governor's powers and authority are to be derived solely from the constitution and from validly enacted laws for which he has the constitutional duty to enforce. (See Kan. Const., Art. 1, §3.) We believe this prinicple is further illustrated by the Court's discussion of one specific power granted the governor by Article 1, Section 7 of the Kansas Constitution, the power to pardon:

> "Generally speaking, the English theory of government was that all powers of government emanated from the king. Laws were enacted, adjudicated and administered by his authority. Prosecutions were conducted in his name. It was the king's peace or the peace and good order of the king's realm which was offended by crime, hence the king could bestow his mercy by pardon. We have a different theory of government. The State v. Dunning, 9 Ind. 20, 23; Cook v. Freeholders of Middlesex, 26 N.J.L. 326, 345. When we withdrew from England we established our government upon the principle that all governmental power is inherent in the people. (U.S. Const., 9th & 10th Amendments; Livingston v. Moore, 32 U.S. 551; Turner v. Williams, 194 U.S. 279; Const. of Kans., Bill of Rights, §§2,20.) Hence crime is an offense against the people, prosecuted in the name of the people, and the people alone can bestow mercy by pardon. Under our form of government, in which we separate, as nearly as can be done, the executive, legislative and judicial branches of government, the pardoning power is neither inherently nor necessarily an executive power, but is a power of government inherent in the people, who may by constitutional provision place its exercise in any official, board or department of government they choose. In State v. Nichols, 26 Ark. 74, 77, it was said:
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> "'So long as the people do not infringe upon the power already delegated to the general government, they are fully authorized to deposit power in such branches as to them may seem best. To illustrate: They had the right to withhold all pardoning power from any one of the three branches; or, on the other hand, they had

the right to vest the pardoning power in either the legislative or judicial branches of the state government. The pardoning power no more vests in the governor, by virtue of his position, than it does in the judicial branch of the government, when the constitution is silent.'

"In The State v. Dunning, 9 Ind. 20, 23, it was said:

"'The governor, then, simply by virute of his office as such, takes no power touching pardons. . . . He derives his power from the constitution and laws alone.'

"In Moore v. City of Newport, 248 S.W. 837 (Ky.):

"'The pardoning power is not inherent in any department or officer of the state, and the people may lodge it in any department they see fit or in a board of pardons.'

"In Laird v. Sims, 16 Ariz. 521, it was said:

"'The pardoning power is not inherent in any state officer or department, but the people, in adopting a constitution, may confer the power on officers or departments as they see fit.'" (Emphasis added.) Jamison v. Flanner, Sheriff, 116 Kan. 624, 634, 635 (1924).

Therefore, it is our opinion that under our constitutional form of government, the governor has no inherent power separate and apart from our constitution, and the authority of the governor must be derived from the specific grants of power to the governor in the constitution and in the laws duly enacted by the legislature thereunder. Thus, as respects powers and duties delegated to the governor by the president, the governor's ability to accept such delegation is dependent upon the existence of specific constitutional or statutory provisions providing such authority, or in such authority as is to be reasonably and necessarily implied therefrom.

Very truly yours,

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