



COMMONWEALTH of VIRGINIA

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The Honorable Robert G. Marshall
Member, House of Delegates
Post Office Box 421
Manassas, Virginia 20108-0421

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the General Assembly, as part of enacting the budget, may delegate authority to make spending decisions regarding Medicaid to a smaller sub-group of elected officials, including members of the General Assembly. Specifically, you ask whether language in the 2013 budget act regarding the implementation of Medicaid expansion constitutes an unconstitutional delegation of the General Assembly's authority.

Response

It is my opinion that the provisions of the 2013 budget act that purport to authorize Medicaid expansion only "[i]f the Medicaid Innovation and Reform Commission determines that" certain conditions set by the General Assembly have been met constitutes a delegation of the General Assembly's legislative authority. It is further my opinion that the General Assembly may not delegate¹ final legislative authority regarding budgetary or other matters to a committee composed of a subset of the members of the General Assembly.

Applicable Law and Discussion

In the 2013 amendments to the 2012 budget,² the General Assembly has provided for the creation of the Medicaid Innovation and Reform Commission (the "Commission").³ The Commission shall be

¹ "The General Assembly has delegated its authority when it enacts a law authorizing another entity to determine whether the law will be imposed." *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 432, 657 S.E.2d 71, 78 (2008) (internal citations omitted).

² The budget amendments are available at <http://leg2.state.va.us/WebData/13amend.nsf/Conf+List/?OpenForm>. Although this legislation was agreed to by both Houses, it is not yet law for it remains subject to the Governor's veto.

composed of 10 voting members, the chairman of the House Committee on Appropriations (or his designee), the chairman of the Senate Finance Committee (or his designee), 4 members of the House Committee on Appropriations appointed by the chairman of the House Committee on Appropriations and 4 members of the Senate Finance Committee appointed by the Chairman of the Senate Finance Committee.⁴ The Commission also includes two, non-voting members in the persons of the Secretary of Health and Human Resources and the Secretary of Finance.⁵

The Commission is directed

to review, recommend and approve innovation and reform proposals affecting the implementation of Title XIX and Title XXI of the Social Security Act, including eligibility and financing for proposals set out in Item 307 of this act. Specifically, the Commission shall review (i) the development of reform proposals; (ii) progress in obtaining federal approval for reforms such as benefit design, service delivery, payment reform, and quality and cost containment outcomes; and (iii) implementation of reform measures.^{6]}

Perhaps most significantly, the Commission must make the final determination as to whether Virginia will expand Medicaid consistent with the terms of the Patient Protection and Affordable Care Act. Specifically, the budget provides that:

a. The Department [of Medical Assistance Services (“DMAS”)] shall seek the approval of the Medicaid Innovation and Reform Commission to amend the State Plan for Medicaid Assistance under Title XIX of the Social Security Act, and any waivers thereof, to implement coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act. **If the Medicaid Innovation and Reform Commission determines that the conditions in paragraphs 2, 3, 4, and 5 have been met, then the Commission shall approve implementation of coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act.**

b. **Upon approval by the Medicaid Innovation and Reform Commission, the department shall implement the provisions in paragraph 6.a. of this item by July 1, 2014, or as soon as feasible thereafter.**^{7]}

³H.B. 1500, Item No. 4-14.00, 2013 Reg. Sess. (Va. 2013), *available at* <http://leg2.state.va.us/WebData/13amend.NSF/ebea1c0863d2f61b8525689e00349981/cd79c35337dc35bd85257b1b004cb317?OpenDocument>.

⁴ *Id.* § 4(B).

⁵ *Id.*

⁶ *Id.* § 4(A).

⁷ H.B. 1500, Item No. 307 § JJJ(6), 2013 Reg. Sess. (Va. 2013) (emphasis added), *available at* <http://leg2.state.va.us/WebData/13amend.nsf/ebea1c0863d2f61b8525689e00349981/1c6d29fff614c86e85257b1b00756af1?OpenDocument>. That the Commission’s purpose is to make the final determination as to whether Virginia will expand its Medicaid program as allowed under the Patient Protection and Affordable Care Act is borne out by the explanatory language accompanying the budget amendment that created the Commission. The explanation states that “[t]his amendment establishes a Medicaid Innovation and Reform Commission in the Virginia General Assembly to review, recommend and approve innovation and reform proposals affecting the Virginia Medicaid and Family Access to Medical Insurance Security (FAMIS) programs, including those set forth in item 307 in the Department of Medical Assistance Services. Language requires an affirmative vote by a majority of the members

Recognizing that there could be disagreement over whether the conditions permitting Medicaid expansion have been met, the General Assembly established particularized voting rules to govern Commission action. Specifically,

[a]n affirmative vote by three of the five members of the Commission from the House of Delegates and three of the five members of the Commission from the Senate shall be required to endorse any reform proposal to amend the State Plan for Medical Assistance under Title XIX of the Social Security Act, and any waivers thereof, to implement coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act.^[8]

In short, the General Assembly has not, as of yet, approved Medicaid expansion. Rather, it has authorized the members of the Commission to make a determination as to whether specified criteria have been met. Thus, the decision as to whether Medicaid expansion will occur will not be made by the General Assembly as a whole, but rather, will be made if as few as six but no more than 10 members of the General Assembly “determine[] that the conditions”⁹ have been met.

Determining whether the conditions are met requires the evaluation of several criteria. Some of the criteria are subjective. The criteria include deciding whether

(i) the services and benefits provided are similar . . . ; (ii) reasonable limitations on non-essential benefits such as non-emergency transportation are implemented; and (iii) patient responsibility is required including reasonable cost sharing and active engagement in health and wellness activities to improve health and control costs.^[10]

The Commission must also determine whether any future reforms

include administrative simplification of the Medicaid program . . . and outline agreed upon parameters and metrics to provide maximum flexibility and expedited ability to develop and implement pilot programs to test innovative models that (i) leverage innovations and variations in regional delivery systems; (ii) link payment and reimbursement to quality and cost containment outcomes; or (iii) encourage innovations that improve service quality and yield cost savings to the Commonwealth.^[11]

Further, the Commission must conclude whether DMAS has sought reforms “to include all remaining Medicaid populations and services in cost-effective, managed and coordinated delivery systems.”¹²

The subjective nature of these criteria require that the members of the Commission exercise their discretion and judgment in determining “that the conditions . . . have been met.”¹³ Thus, the ultimate

appointed from each body to approval (sic) Medicaid expansion for newly eligible individuals pursuant to the Patient Protection and Affordable Care Act.”

⁸ H.B. 1500, Item No. 4-14.00 § 4(D)(2).

⁹ See H.B. 1500, Item No. 307 § JJJ(6)(a).

¹⁰ *Id.* § JJJ(3).

¹¹ *Id.*

¹² *Id.* § JJJ(4).

¹³ Not all of the stated conditions are subjective. For example, one of the conditions is that DMAS “provide a report to the Medicaid Innovation and Reform Commission on the specific waiver and/or State Plan changes that have been approved and status of implementing such changes, and associated cost savings or cost avoidance to

decision as to whether Virginia will expand Medicaid, effectively promising to make the necessary appropriations related to the expansion is not committed to the General Assembly as a whole, but rather, is committed to the judgment, discretion and ultimate vote of the individual members of the Commission.¹⁴

Given that you question the constitutionality of this arrangement, I note that the analysis of a law's constitutionality begins with the recognition that the General Assembly does not operate under a grant of authority, but rather, that it has all powers except those prohibited by either the Virginia or United States Constitutions.¹⁵ Enactments of the General Assembly are presumed to be constitutional, and the Virginia Supreme Court "will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions."¹⁶ The Supreme Court will "give the Constitution [of Virginia] a liberal construction in order to sustain the enactment in question, if practicable[.]"¹⁷ and "every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity."¹⁸

While the General Assembly's powers are broad, they are not unlimited. "An act is unconstitutional if it is expressly prohibited or is prohibited by necessary implication based upon the provisions of Constitution of Virginia or the United States Constitution."¹⁹ Furthermore, the General Assembly is prohibiting from doing indirectly that which the Virginia Constitution prohibits it from doing directly.²⁰

Medicaid/FAMIS expenditures." H.B. 1500, Item No. 307 § JJJJ(5). Such an objective condition, by itself, would not constitute an impermissible delegation of the General Assembly's authority.

¹⁴ Including the direction that, if the members determine that the conditions have been met, they "shall approve implementation of coverage for newly eligible individuals pursuant to 42 U.S.C. § 1396d(y)(1)[2010] of the Patient Protection and Affordable Care Act . . .[.]" H.B. 1500, Item No. 307 § JJJJ(6)(a), does not make the members' determination any less an exercise of judgment and discretion. The instruction to vote is only effective after the predicate of a member of the Commission, in the exercise of the delegated judgment and discretion, having made a determination that the conditions have been met. It is the ability to use the judgment and discretion necessary to make the underlying determination that constitutes the exercise of the General Assembly's authority.

¹⁵ VA. CONST. art. IV, § 14 ("The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted[.]"); *Harrison v. Day*, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (The Virginia Constitution "is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.").

¹⁶ *Marshall*, 275 Va. at 427, 657 S.E.2d at 75 (citing *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council of Emporia v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

¹⁷ *Id.* at 428, 657 S.E.2d at 75 (citing *Heublein, Inc. v. Dep't of Alcoholic Beverage Control*, 237 Va. 192, 195, 376 S.E.2d 77, 78 (1989)).

¹⁸ *Id.* (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)). See *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980); *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

¹⁹ *Marshall*, 275 Va. at 428, 657 S.E.2d at 75-76 (citing *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952); *Kirkpatrick v. Bd. of Supvrs.*, 146 Va. 113, 126, 136 S.E. 186, 190 (1926); *Albemarle Oil & Gas Co. v. Morris*, 138 Va. 1, 7, 121 S.E. 60, 61 (1924); *Button v. State Corp. Comm'n*, 105 Va. 634, 636, 54 S.E. 769, 769 (1906); *Smith v. Commonwealth*, 75 Va. (1 Matt.) 904, 907 (1880); *Sch. Bd. v. Shockley*, 160 Va. 405, 413, 168 S.E. 419, 422 (1933)).

²⁰ *Id.* at 435, 657 S.E.2d at 80.

The legislative power of the Commonwealth is to be exercised by the General Assembly. Article IV, §1 of the Virginia Constitution provides that “[t]he legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates.” Other provisions of Article IV describe the procedures that must be employed for the General Assembly to utilize that power.

Article IV, § 11 specifies how a bill becomes a law. Specifically, it provides that:

No bill shall become a law unless, prior to its passage: (a) it has been referred to a committee of each house, considered by such committee in session, and reported; (b) it has been printed by the house in which it originated prior to its passage therein; (c) it has been read by its title, or its title has been printed in a daily calendar, on three different calendar days in each house; and (d) upon its final passage a vote has been taken thereon in each house, the name of each member voting for and against recorded in the journal, and a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house, recorded in the affirmative.

Thus, for any enactment to become effective, it must be passed by a majority of the members of each house of the General Assembly. Furthermore, it must be then presented to the Governor for his signature or veto.²¹

While the general rule is that, assuming a quorum, a simple majority of those voting in each house is all that is necessary to effectuate an enactment, budgetary matters have more stringent requirements. Specifically,

[n]o bill which creates or establishes a new office, or which creates, continues, or revives a debt or charge, or which makes, continues, or revives any appropriation of public or trust money or property, or which releases, discharges, or commutes any claim or demand of the Commonwealth, or which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal.^[22]

Accordingly, budget matters require the affirmative vote of at least 51 members of the House of Delegates and 21 members of the Senate, regardless of how many members actually vote on the matter.²³

These provisions limit the authority of the General Assembly. The General Assembly may not avoid them by simply passing a statute that provides that an act, or some part of an act, will become effective in the future if a subset of the General Assembly determines that certain subjective conditions are met or that prudence dictates that the act becomes effective.²⁴

²¹ VA. CONST. art. V, § 6.

²² VA. CONST. art. IV, § 11.

²³ Given the inclusion of the language in the budget and the fact that Medicaid expansion amounts to a significant financial commitment of the Commonwealth going forward, it is clear that this provision is subject to this requirement.

²⁴ As noted above, this does not mean that the General Assembly cannot condition certain budget matters on future events. For example, an enactment that provided that a particular program would be funded only if the Commonwealth’s revenues reached a certain level would likely pass constitutional muster because whether or not the condition has been met can be objectively determined and requires no one to exercise judgment or discretion on a matter reserved for the General Assembly.

The purpose behind the requirements of Article IV, § 11 regarding budget matters is self-evident. They seek to promote transparency and accountability when the General Assembly utilizes its powers regarding taxing and spending. The provisions assure a citizen that a majority of the members elected to both houses actually support the enactment and ensure that citizens can know exactly how their representatives (and all of the other representatives) voted on the issue. Delegating final decision-making authority to a subset of the General Assembly removes these safeguards.

Thus, while the General Assembly has the authority and responsibility to pass legislation related to budgetary matters such as Medicaid expansion, it may exercise that power only consistent with the provisions of Article IV, § 11 and may not delegate the decision of whether a budgetary enactment, or some part of an enactment, becomes effective to a subset of its members.

In reaching this conclusion, I offer no judgment on the wisdom of the policy decisions underlying the decision whether or not to expand Medicaid. The legal opinion I offer here is limited solely to the method the General Assembly has chosen regarding Virginia's ultimate decision on the issue. For the above stated reasons, I conclude that this particular method violates the Virginia Constitution.

Conclusion

Accordingly, it is my opinion that the Virginia Constitution prohibits the General Assembly from delegating final legislative authority regarding budget or other enactments to a committee comprised of a subset of the members of the General Assembly.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General