



COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

May 30, 2014

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The Honorable L. Scott Lingamfelter
Member, House of Delegates
Post Office Box 7175
Woodbridge, Virginia 22195

The Honorable C. Todd Gilbert
Member, House of Delegates
Post Office Box 309
Woodstock, Virginia 22664

Dear Delegates Lingamfelter and Gilbert:

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

Issues Presented

You ask whether the Governor of Virginia has authority to fail to implement or to follow a valid law that has been passed by the General Assembly and signed into law by the Governor in the absence of the General Assembly granting that authority either by statute or by the law's enactment clause. You also ask whether the President of the United States has authority not to implement the Affordable Care Act.

Response

It is my opinion that the Governor must enforce valid, duly enacted laws unless the power to delay or suspend enforcement is granted by statute¹ or by the law's enactment clause.² Based on longstanding precedent of this Office, I also conclude that a question related to the scope of power that can be exercised by the President of the United States with regard to enforcing a particular federal law is not an appropriate subject for an official Opinion of this Office.

¹ One example of a statute granting modification and suspension authority is VA. CODE ANN. § 2.2-4014 (2011), which allows the relevant standing committees of the General Assembly, or the Joint Commission on Administrative Rules, which is created by VA. CODE ANN. § 30-73.1 (2011), to object to regulations or, with the concurrence of the Governor, to modify or suspend regulations.

² Herein, the phrase "duly enacted" means passed by the General Assembly and signed by the Governor, and it also means, in the case of a bill vetoed by the Governor, where the General Assembly has voted to override the veto pursuant to VA. CONST. art. V, § 6(b)(ii). This Opinion assumes that the laws at issue do not have any constitutional infirmity. If a constitutional infirmity in a particular law does exist, a separate legal analysis would be necessary. Such an analysis is beyond the scope of this Opinion.

Applicable Law and Discussion

I. General Duty Of Governor To Enforce Laws

Your first inquiry implicates several provisions of the Constitution of Virginia. First, Article IV, § 1 vests the legislative power of the Commonwealth in the General Assembly.³ Article V, § 7 provides, in pertinent part, that “[t]he Governor shall take care that the laws be faithfully executed.”⁴ This provision is commonly known as the “take care” clause.⁵ Our Constitution further expressly requires the separation of powers: Article I, § 5 provides that “the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . [.]” and Article III, § 1 provides that “[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time”⁶ Finally, Article I, § 7 expressly provides “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”⁷

A recent Opinion of this Office discusses the history and interplay of these constitutional provisions.⁸ Although the Opinion dealt specifically with the application of these provisions to the Governor’s power, through formal action, to suspend the enforcement of regulations having the force of law,⁹ the reasoning of the Opinion applies equally to the failure of the Governor to enforce, implement, or follow duly enacted statutes. Indeed, as the Opinion explains, “[p]rohibiting the executive from suspending duly enacted laws has long been part of Virginia’s constitutional history.”¹⁰

Ignoring or failing to implement a duly adopted regulation or statute has the same practical effect as actively issuing a directive suspending the enforcement of such law. To conclude otherwise, in a fashion analogous to permitting the Governor to issue an order suspending or ignoring a regulation, “would render the ‘take care’ clause of the Virginia Constitution a mere nullity.”¹¹ Further, in concluding

³ VA. CONST. art. IV, § 1.

⁴ VA. CONST. art. V, § 7.

⁵ Virginia’s “take care” clause first appears explicitly in the Virginia Constitution of 1830. VA. CONST. of 1830 art. IV, § 4. It has appeared in every subsequent version of the Virginia Constitution. *See* VA. CONST. of 1851 art. V, § 5; VA. CONST. of 1864 art. V, § 5; VA. CONST. of 1870 art. IV, § 5; and VA. CONST. of 1902 § 73.

⁶ VA. CONST. art. I, § 5 and art. III, § 1. The separation of powers is a bedrock principle of Virginia government. The concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. *See* VA. CONST. of 1830 art. I, § 5 & art. II; VA. CONST. of 1851 art. I, § 5 & art. II; VA. CONST. of 1864 art. I, § 5 & art. II; VA. CONST. of 1870 art. I, § 7 & art. II; and VA. CONST. of 1902 §§ 5 & 39.

⁷ VA. CONST. art. I, § 7. The explicit prohibition on suspending laws first appeared as § 7 of the Virginia Declaration of Rights of 1776. It has appeared in every subsequent version of the Virginia Constitution. *See* VA. CONST. of 1830 art. I, § 7; VA. CONST. of 1851 art. I, § 7; VA. CONST. of 1864 art. I, § 7; VA. CONST. of 1870 art. I, § 9; and VA. CONST. of 1902 § 7.

⁸ *See* 2014 Op. Va. Att’y Gen. No. 13-109, *available via link at* <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2014opns/Jan14opndx.html>.

⁹ The explicit question addressed in the prior Opinion was “whether the Governor has the power to issue a policy directive to suspend a regulation that was properly adopted pursuant to a statutory mandate.” *Id.* at 1.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4.

that the Governor may not unilaterally suspend a validly promulgated regulation, the previous Opinion noted that such action “is as much a violation of the separation of powers as if the Governor sought to suspend the operation of a Virginia statute,”¹² the action about which you inquire.

II. Duty Of President To Enforce Laws

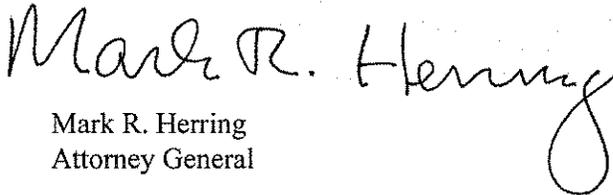
Your second inquiry is whether the President of the United States may fail to implement or follow a specific law - the Affordable Care Act - that has been passed by Congress and that he has signed into law. Although this Office does from time to time interpret federal law, that is done in order to address the interplay between specific provisions of federal law and the laws of the Commonwealth. Such opinions, when rendered, help to inform state or local decisions. Questions related to the President’s inherent, implied, or express authority are governed by a complex interplay of the United States Constitution and various federal laws, including federal legislative history, federal common law, and possibly opinions of the United States Attorney General and the Office of Legal Counsel. Finally, it is important to note a practical consideration: the President is not subject to or guided or governed by Opinions of this Office, and thus any Opinion our office might render on this subject would be merely academic. It would not have any practical impact on either the President’s conduct or state or local decisions. In these circumstances, the question of the President’s authority not to implement a particular law should be resolved by appropriate federal authorities, not by this Office. For those reasons, I respectfully decline to offer an Opinion of the Office on the matter.

Conclusion

Accordingly, it is my opinion that the Governor must enforce duly enacted valid laws, unless the power to delay or suspend enforcement is granted by statute or by the law’s enactment clause. It is further my opinion that a question related to the President of the United States declining to implement a particular federal law is not an appropriate subject for an official Opinion of this Office.

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

¹² *Id.* at 5. The prior Opinion notes that there may be instances “where a statute . . . allows for [suspension] under certain circumstances, and thus, such suspension would not necessarily violate the separation of powers[.]” *id.* n.28; your request, however, expressly is limited to situations in which there is no statutory allowance.