Board of Health: House Bill No. 501 is valid and authorizes the board to set up a merit system of its own.

September 15, 1941

9-16

Mr. A. Louis Landwehr
Business Administrator
Board of Health
Jefferson City, Missouri

FILE

Dear Sir:

This will acknowledge receipt of your letter of September 10, 1941, which is as follows:

"Under the provisions of House Bill 501, 61st General Assembly the State Board of Health must comply with any of the rules and conditions made by the United States Public Health Service, The Children's Bureau or any other federal agency or any other branch of United States Government acting under the provisions of the federal law in order to secure for the State of Missouri funds allotted to this State by the United States Government for health purposes under the provisions of such act of Congress relating to health.

"In reference to the above, the Board of Health requests an opinion from your office as to whether this Bill constitutes an enabling act to allow said Board to come under the State Merit System or whether it will be necessary to set up our own merit system. We would also like to know the proper procedure for the handling and paying out of these federal monies."

House Bill 501, Sixty-first General Assembly, as passed and approved, provides as follows:

> "The State Board of Health is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for Health purposes and to comply with any of the rules or conditions made by the United States Public Health Service, The Children's Bureau or any other Federal agency in regard to health funds distributed to the States, and to comply with any of the rules and conditions made by said services or bureaus or other branches of the United States Government acting under the provisions of the Federal law in order to secure for the State of Missouri funds allotted to this state by the United States Government or health purposes under the provisions of such acts of Congress, relating to health; * * * * * * * * * * *."

The background for this piece of legislation is in certain acts of Congress granting money to the State of Missouri and attaching certain conditions to those grants.

In the Act appropriating money to the State of Missouri for maternal and child-health services, 42 U. S. C. A. Section 703 (a), (3) is as follows:

> "A State plan for maternal and child-health services must * * * * * * * * * (3) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel stand-

> ards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient operation of the plan. * * * * * * * * * *."

In the Act appropriating money to the State of Missouri to provide services for crippled children, 42 U. S. C. A., Section 713 (a), (3) is as follows:

> "A State plan for services for crippled children must * * * * * * * * * * * (3) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient operation of the plan. * * * * * * * * * * *."

Article IV, Section 1 of the Missouri Constitution is as follows:

> "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

In Merchants Exchange v. Knott, 212 Mo. 616, it is said of this provision, l. c. 640:

"Legislative power in Missouri is, therefore, lodged with the General Assembly and not elsewhere except as to such of it as may be delegated under the provisions of that instrument - for instance, to cities in matters of local concern. Briefly, legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Ken, 'is a rule of civil conduct prescribed by the supreme power of a state.' (1 Kent. Com. (14 Ed.) 447.) That definition is part of Sir William Blackstone's, which adds, 'commanding what is right and prohibiting what is wrong.' In his notes to Blackstone (1 Sharswood's Blk. Comm., p. 44) Judge Sharswood defines a law to be: 'A rule of civil conduct prescribed by the supreme power in a State, commanding what is to be done, and prohibiting the contrary.'

"Now, a rule is a rule, as distinguished from whim, caprice, compact, agreement, or mere discretion. 'Prescribed' means that the rule must not remain in the breast of the Legislature but shall be manifested and published in a public and conspicuous manner so as to be known as a rule of civil conduct. (1 Blk., p. 45.) That author instances Caligula's laws as violative of the idea evidenced by the word 'prescribed.' For it is said of that Emperor, according to Dio Cassius, that he wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people. Moreover, the rule must be 'prescribed by the supreme power in a State' - not by Roe, Doe, Box Cox, et al. Speaking to that part of his definition, Blackstone says (1 Blk., 46): 'For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore, it is requisite to the very essence of a law that it be made

by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.'

"(b) Measured by the foregoing definition of law, can the statute stand? We think not. We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, to say when and where it is law is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission. True, the act was passed by the General Assembly, approved by the Chief Executive and stands published as authenticated law, but to all intents and purposes it is only a barren ideality, having such life as is thereafter breathed into it from an unconstitutional source. No Missourian may know whether it applies to him or his concerns, as a rule of civil conduct, or will ever apply until in the 'opinion' of the commissioners it 'may be' considered 'necessary.'

"The General Assembly may not clip itself of one iota of its lawmaking power by a voluntary delegation of any element of it - by putting its constitutional prerogatives its conscience and wisdom, 'into commission.' On this point Judge Cooley says in an oft-quoted passage (Cooley's Const. Lim. (6 Ed.) 137): 'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility.

> by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patroitism of any other body for those to which alone the people have seen fit to confide this sovereign trust.'"

Measured by these rules the court held invalid an act that purported to delegate to a commission the (212 Mo. 636): "* * * power to capriciously say (as their 'opinion' serves) to what places, in what territory and at what times the statute shall apply, or whether it shall be in force on a single square inch of Missouri soil." The court further said (212 Mo., l. c. 637):

> "It is obvious that the foregoing grant of power is given without statutory landmark, compass, map, guide-post or cornerstone in one whit controlling its exercise or prescribing its channel, or indicative of any certain intendment of the legislative mind, beyond the mere grant. In essence it is the power of pure and simple despotism. * * * * * * * * * * *."

Article I, Section 1 of the United States Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In A. L. A. Schechter Poultry Corporation v. United States, 55 Sup. Ct. 837, (N.R.A. Cases) the court said of this provision, l. c. 843:

"The question of the Delegation of Legislative power.--We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Refining Company v. Ryan, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446. The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article 1, Section 1. And the Congress is authorized 'To make all Laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, Sec. 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the Panama Refining Company Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. Id., 293 U. S. 388, page 241, 55 S. Ct. 241, 79 L. Ed. 446."

Under these rules the court held invalid an act authorizing the President to establish "Codes of Fair Competition" for business, but which laid down no criterion to govern the action of the President. It did not define what constituted "fair competition."

In order to answer the question before us, it is necessary to consider and determine the validity of both the Federal and State statutes above set forth.

In testing the validity of the state statute we desire to point out the following.

In Brock v. Superior Court, 71 P. (2d) 209(Cal.), 114 A. L. R. 127, it is held that a state legislature may adopt an existing law of Congress. The court said, l. c. 134:

> "* * * It is of course, perfectly valid to adopt existing statutes, rules, or regulation of Congress or another state, by reference; but the attempt to make future regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power. See In re Burke, 190 Cal. 326, 212 P. 193; Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202; and note, 34 Colum. L. Rev. 1077, 1084."

The same rule is also applied in Featherstone v. Norman, 153 S. E. 58 (a), 70 A. L. R. 449, 466, where it is said:

> "* * * Adoption of existing exemptions and an existing method is not a delegation to Congress of the legislative power of the state. Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202. This act in no way undertakes to make future federal legislation a part of the law of this state upon that subject. When a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and

> descriptive reference thereto, the adoption takes the statute as it exists at that time. * * * * * * * * * * *."

Again, in Smithberger v. Banning, 262 N. W. 492 (Neb) 100 A. L. R. 686, the court held invalid an act of the State Legislature which was dependent for its operation upon the passage of legislation by Congress. The court said, l. c. 695:

> "* * * As we have herein determined this set of facts constitutes a delegation of legislative power to the Congress of the United States. The power to determine the amount to be raised by the tax is dependent upon federal legislation not yet passed."

It is, therefore, to be seen that an act of the state legislature of this nature must lay down a definite rule of action upon a course prescribed that is capable of ascertainment and can only adopt existing legislation of Congress - not future acts of Congress.

House Bill No. 501 does lay down a definite rule of action - the Board of Health is to comply with acts of Congress relating to the distribution of funds in these particulars and to comply with any rules and conditions made by the United States Public Health Service, The Children's Bureau or other Federal agency in regard to health funds distributed to the states. We know the acts of Congress can be ascertained as of October 10, 1941, the effective date of House Bill No. 501, and assume that the various departmental rules and regulations as of that date can also be ascertained.

We therefore think there is no complaint on the score of delegation of authority that can be made with respect to House Bill No. 501. In effect, the General Assembly of Missouri has said: The Acts of Congress and the departmental rules and regulations of the Federal agencies in regard to the health funds distributed to this state as they exist on October 10, 1941, shall be the law of this state.

Of course, this conclusion presupposes that the acts of Congress above set forth are valid and that the rules made thereunder constitute the mere filling in of administrative details - not legislation.

We have seen the acts of Congress requiring the state plans to provide methods relating to the establishment and maintenance of personnel standards on a merit basis "as are necessary for the proper or efficient operation of the plan."

We have seen the rules prescribed by the Federal Agencies setting forth what is "necessary for the proper and efficient operation of the plan" so far as the merit system is concerned.

To us there seems to be no logical distinction between legislation authorizing the President to establish "codes of fair competition" for business without laying down a criterion to govern his action, and legislation authorizing a Federal agency to determine what type of merit plan is "necessary for the proper and efficient operation of the plan," without laying down a criterion to govern its action. In each the power given is "without statutory landmark, compass, map, guidepost or corner-stone in one whit controlling its exercise or prescribing its channel, or indicative of any certain intendment of the legislative mind, beyond the mere grant." In the one, the code was to be "fair", in the other the plan is to be "proper." This is not Congress "laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." The power held by the Federal agencies under the acts heretofore set forth, "in essence * * * is the power of pure and simple despotism."

Were we permitted to rest legal conclusions nowadays on completely analogous pronouncements heretofore made by the courts, it would appear that the acts of Congress, leaving to the Federal agencies the authority to determine if a state merit system is "proper," are invalid as a delegation of legislative authority. However, we must keep in mind that the Knott Case was decided in 1908 and the N. R. A. Case in 1935. Since the last date, the theory of the "Constitution as it speaks today," (Marsh v. Bartlet, Mo. Sup. 121 S. W. (2d) L. c. 742) has bloomed, and we find that legislation is held valid because the expanding need of state and nation demand such constitutional

construction. Further, the recent cases of Currin v. Wallace, 306 U. S. 1, 83 L. Ed. 441 (1938) and United States v. Rock Royal Co-Operative, 307 U. S. 533, 83 L. Ed. 1446 (1938), approving certain broad delegations of authority to the Secretary of Agriculture, while not analogous to the present statutes, indicate that the United States Supreme Court, as presently constituted, would, in all probability, uphold the provsions of the acts of Congress above set forth as proper, and sufficiently definite to avoid being a delegation of legislative authority.

Since we can no longer rely on past precedent, but must speculate on what the United States Supreme Court will do in the future, we must, in view of the trend reflected in the cases last cited, concede that the provisions heretofore set forth in the acts of Congress are valid. At least, they carry a presumption of validity, since every act of Congress is presumed to be valid until a court of competent jurisdiction declares otherwise.

It is, therefore, our opinion that under House Bill 501 the State Board of Health may take such action as may be necessary, relative to the establishment of a merit system, in order to comply with the acts of Congress and administrative rules therein designated that exist as of October 10, 1941. We desire to add, however, that House Bill No. 501 does not authorize the Board of Health to comply with any act of Congress or rule or regulation that may be enacted or promulgated after the effective date of House Bill No. 501.

In connection with this you ask in your request whether House Bill 501 allows the Board of Health "to come under the State Merit System or whether it will be necessary to set up" its own merit system. We are of the opinion the Board will have to set up a merit system of its own. There is no such thing as a State Merit System in Missouri. The only other merit systems in operation in this state are those carried on by the Unemployment Compensation Commission and the Social Security Commission. The first has for its authority Section 9426 d, R. S. Missouri, 1939, which relates to the Unemployment Compensation Commission alone. So far as we are informed, unless the Sixty-first General Assembly took some action, the Social Security Commission has no statutory authority supporting the merit system there in use. At any rate, neither plan is

available to the Board of Health. House Bill 501 adopts statutes and regulations of the Federal Government, not of the Unemployment Compensation Commission or the Social Security Commission.

We think this holds true even if the Federal regulations permit the Board to adopt or come under one of the merit systems already in operation in this state. The reason for this is the fact that House Bill 501 imposes a duty upon the State Board of Health which it must perform. To merely come under either of the other merit systems in operation in this state, would be a delegation by the board to another governmental agency of this state of its authority in this respect. This, we think, the board may not do. Further, to do so, would violate the intent of the Legislature of this State. To date that body has enacted House Bill 501 and Section 9426 d, R. S. Missouri, 1939, on the subject of merit systems. The fact there are two separate acts in no way referring to each other, indicates an intention on the part of the General Assembly to require separate merit plans. That intention is, of course, controlling.

With respect to that part of your request desiring to know the proper procedure for handling and paying out these Federal moneys, it appears that House Bill No. 501 further provides as follows:

> "* * * said funds shall be received by the State Treasurer and deposited in separate funds to be known as the United States Public Health Title VI funds, the Veneral Disease Control fund, the Children's Bureau fund, and any other fund specially designated by a Federal agency for the use of the State Board of Health for health purposes, and to be paid out by the State Treasurer on requisitions drawn by the executive officers of the State Board of Health on a warrant of the State Auditor. Said funds being allotted to the State of Missouri for health purposes by the Federal Government of the General Assembly shall appro-

priate the same to the use of the State Board of Health, under such provisions as are set out for the reception and use of funds by the Federal Government."

To us that seems to be sufficiently definite to need no explanation. Further, it would appear such is merely a matter of accounting and does not present any legal question for our opinion.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

LLB/rv