

HOUSE No. 6557

The Commonwealth of Massachusetts

LEGISLATIVE RESEARCH COUNCIL

Report Relative to

GUBERNATORIAL EXECUTIVE ORDERS

**FOR SUMMARY, SEE
TEXT IN BOLD FACE TYPE**

April 3, 1981

The Commonwealth of Massachusetts

ORDER AUTHORIZING STUDY

(House, No. 6782 of 1980)

Ordered, That the Legislative Research Council be authorized and directed to make a study and investigation of the constitutional and statutory authority of the governor to issue executive orders having the force of law; and that said Council file its statistical and factual report hereunder with the Clerk of the House of Representatives on or before the last Wednesday of February in the year nineteen hundred and eighty-one.

Adopted:

By the House of Representatives, June 27, 1980

By the Senate, in concurrence, June 30, 1980

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The Commonwealth of Massachusetts

**LETTER OF TRANSMITTAL TO THE
SENATE AND HOUSE OF REPRESENTATIVES**

To the Honorable Senate and House of Representatives:

LADIES AND GENTLEMEN: — In compliance with the legislative directive in House, No. 6782 of 1980, the Legislative Research Council submits herewith a report prepared by the Legislative Research Bureau relative to the constitutional and statutory authority of the Governor to issue executive orders having the force of law.

The Legislative Research Bureau is restricted by statute to “statistical research and fact-finding.” Hence, this report contains only factual material without recommendations or legislative proposals by that Bureau. It does not necessarily reflect the opinions of the undersigned members of the Legislative Research Council.

Respectfully submitted,

MEMBERS OF THE LEGISLATIVE RESEARCH COUNCIL

Sen. ANNA P. BUCKLEY of Plymouth, *Chairman*
Rep. MICHAEL J. LOMBARDI of Cambridge, *House Chairman*
Sen. JOSEPH B. WALSH of Suffolk
Sen. JOHN F. PARKER of Bristol
Sen. ROBERT A. HALL of Worcester
Rep. WILLIAM P. NAGLE, JR. of Northampton
Rep. IRIS K. HOLLAND of Longmeadow
Rep. SHERMAN W. SALTMARSH, JR. of Winchester
Rep. BRUCE N. FREEMAN of Chelmsford
Rep. CHARLES N. DECAS of Wareham

The Commonwealth of Massachusetts

**LETTER OF TRANSMITTAL TO THE
LEGISLATIVE RESEARCH COUNCIL**

To the Members of the Legislative Research Council:

LADIES AND GENTLEMEN: — The joint order, House, No. 6782 of 1980, reprinted on the inside of the front cover of this report, directed the Legislative Research Council to study and investigate the constitutional and statutory authority of the Governor to issue executive orders "having the force of law."

The Legislative Research Bureau submits such a report herewith. Its scope and content have been circumscribed by statutory provisions which limit Bureau output to factual reports, without recommendations by the Bureau. The preparation of this report was the primary responsibility of James Hugh Powers of the Bureau staff.

Respectfully submitted,

DANIEL M. O'SULLIVAN, *Director*
Legislative Research Bureau

The Commonwealth of Massachusetts

GUBERNATORIAL EXECUTIVE ORDERS

SUMMARY OF REPORT*Study Directive*

This report is submitted by the Legislative Research Council pursuant to a joint order which was introduced into the 1980 General Court by Representative Michael J. Lombardi of Cambridge, House Chairman of that Council, and adopted by the two branches late in June 1980 (House, No. 6782). That directive required the Council to examine the constitutional and statutory authority of the governor to "issue executive orders having the force of law."

In Massachusetts, as in all other states whose practices on this score have been reported to the Legislative Research Bureau, there are no formal definitions of the term "executive order" or "proclamation" in the state constitution, and few such definitions in the statutes. In certain instances, gubernatorial "proclamations," like certain proclamations of the President of the United States, have "executive order" characteristics.

Gubernatorial executive orders and "proclamations" may be ceremonial, or may amount to little more than public relations exercises. Or, they may be substantive instruments with the force of law. Some gubernatorial executive orders are indistinguishable from rules and regulations issued by regulatory and quasi-judicial agencies of the state executive branch, apart from the fact that those orders emanated directly from the governor himself.

Proclamations by a governor may or may not have the characteristics of gubernatorial executive orders. They may be ceremonial only, without legal effects. Proclamations may also be used to invoke or to activate otherwise "dormant" constitutional and statutory provisions, with very significant legal consequences. Among the gubernatorial and presidential proclamations of this sort are those establishing martial law, proclaiming civil defense emergencies, taking over public utilities threatened by labor disputes, dedicating public property to particular uses, and calling special elections. At the national level, presidential proclamations are used to put into effect treaties, conventions and

protocols which become thereby a part of the "supreme law of the land"; such proclamations activate international agreements of lesser stature, such as executive agreements on foreign trade matters.

British and Colonial Origins of the Gubernatorial Executive Order

Although the use of executive orders by Massachusetts governors on a formal, systematic basis is a relatively recent development in this century, the gubernatorial executive order has ancient legal origins tracing back to the "writs" issued by Anglo-Saxon monarchs of England, and to "Orders in Council" which have been used in England since the Middle Ages.

Originally, these latter orders were formulated by the English monarch, with the advice of his Privy Council, a body composed of leading nobles and the king's chief ministers. With the evolution of parliamentary government after the downfall of James II in 1689, the Prime Minister and his Cabinet officers became members of, and the controlling force in the Privy Council, as the monarch's role declined to a formality. Orders in Council entail an exercise of the inherent legislative and executive powers of the Crown derived from British common law, and have been used as directives to administrative and judicial authorities for the execution of policies of the British Government and for the administrative implementation of laws enacted by Parliament.

The American Colonists were familiar with Orders in Council and their uses, and adapted this form of executive order to their own political system, in the form of orders issued by the colonial governors "by and with the advice and consent" of a governor's (executive) council. With modifications reflecting the Separation of Powers Doctrine, these practices were carried over into the republican constitutions adopted by Massachusetts and the other states following the outbreak of the American Revolution. As governor's councils were eliminated, or shorn of functions, executive orders became orders of the governor alone in most instances.

Increased Use of Gubernatorial Executive Orders in Massachusetts

With an increase in their duties and responsibilities through constitutional and statutory action, Massachusetts governors have resorted increasingly to executive orders for policy, administrative and other reasons. Between 1941 and 1947, a total of 99 executive orders were issued by Governors Saltonstall, Tobin and Bradford, nearly all of them under the War Powers Act of 1941 and 1942. A brief three-year

interval followed, before further executive orders were promulgated in 1950. During the 15-year period 1950-1964, a total of 47 gubernatorial executive orders were issued, all but a few being based on powers conferred by the Civil Defense Act of 1950 (as amended). Within the following 16 years, through December 31, 1980, the output of gubernatorial executive orders rose 206 percent, to 144. The 291 gubernatorial executive orders aforesaid do not include purely ceremonial proclamations and executive orders, which now exceed 80 annually, honoring historic events, personages, and various causes, ethnic groups and the like.

State agency organization and administration reflect the dominant area for executive order usage, accounting for 133 such orders since 1941. The proliferation of federal aid programs calling for state participation and intergovernmental funding has provided stimulus for gubernatorial resort to executive orders. Of the 32 orders on this score since 1941, 23 have been issued in the last 15 years.

Governor Leverett Saltonstall (1939-45) issued the largest number of executive orders (75), 51 of which rested on powers conferred by Civil Defense statutes. Governor Francis W. Sargent (1969-75) ranks second with 48, followed by Governor Edward J. King who has issued 41 executive orders to date.

Legal Bases of Gubernatorial Executive Orders in Massachusetts

Constitutional Bases

In general, the Governor has implied constitutional authority to issue executive orders under provisions of the Massachusetts Constitution which: (a) designate him as "supreme executive magistrate" with specific and inherent powers as such (Part II, c. II, s. I, Art. I); (b) imply his constitutional obligation to enforce the laws faithfully; and (c) designate him as commander-in-chief of the armed forces of the state (Part II, c. II, s. I, Arts. VII and X). In addition, the General Court has constitutional authority to enact laws (a) assigning duties and responsibilities to the governor in the discharge of which he acts as the agent of that body, and (b) defining his war and emergency powers (Part II, c. I, s. I, Art. IV; Part II, c. II, s. I, Art. VII). In these latter connections, the General Court may authorize the issuance of executive orders by the governor. Executive Council approval of gubernatorial executive orders is necessary only where required by statute, or where their issuance without that assent would clearly infringe on the reserved constitutional jurisdiction of the Council.

The governor is also believed to possess certain very limited but as

yet unadjudicated "inherent powers" of common law character, which passed from the Colonial governorship to the present governorship under a "Grandfather Clause" in the Constitution (Part II, c. VI, Art. VI).

The Supreme Judicial Court has held that the governor may, in the exercise of his "inherent" constitutional authority as "supreme executive magistrate," use executive orders to create advisory commissions, committees or councils to assist him in the performance of his duties, so long as he does not yield to them responsibilities vested ultimately in him by the Constitution.

The Court has also ruled that, unless specifically authorized by statute, the governor may not, by executive order or otherwise: (a) suspend a state law; (b) change procedures mandated by law for the formulation, amendment and approval of regulations made by state regulatory agencies; (c) transfer appropriations from one line item in the annual appropriation acts to another; or (d) impound appropriated funds in ways which alter or negate social and program priorities ordained by the General Court. Statutes authorizing the governor to suspend laws must be specific as to the statutes he may suspend, and may not give him a vague "roving commission" to suspend laws on emergency or other grounds (Part I, Art. XX). The Court has emphasized, as a general proposition, that gubernatorial executive orders may not contravene any constitutional or statutory provision.

Within the above context, the Supreme Judicial Court has held that the governor may by executive order or otherwise take those measures necessary to qualify the state to receive federal financial assistance, where such measures are authorized specifically or by very clear implication in statutes. The governor's action must be supported beyond a reasonable doubt by the legislative history of the statute under which his order is to be issued, if that action involves suspension of another state law in whole or in part.

Statutory Bases.

The Massachusetts statutory provisions authorizing the governor to issue proclamations on 86 ceremonial occasions (76) far outnumber those which make specific reference to his issuance of proclamations and executive orders having the force of law (6). Two other statutes dealing with gubernatorial executive orders include one such law validating a particular executive order, and a second law requiring executive orders to be filed with the state secretary for publication in the Massachusetts Register.

The statutes specifically authorizing the governor to issue proclama-

tions and executive orders having the force of law permit him to do so only in relation to emergencies arising from (a) war, sabotage and other hostile activity, (b) civil disorders, (c) natural disasters, (d) water shortages, (e) nuclear accidents, and (f) fires. The principal source of the governor's authority aforesaid is the Civil Defense Act of 1950 (as amended).

Implied gubernatorial authority to issue proclamations and executive orders is found in (a) the Slichter Act of 1947 (G.L. c. 150B) which vests emergency powers in the governor in respect to private sector industrial disputes which threaten the public health and safety, and (b) statutory provisions relative to interruptions of the public mass transportation services of the Massachusetts Bay Transportation Authority (G.L. c. 161A, s. 20).

Except as to the foregoing major emergency situations, the General Court has been reluctant to empower the governor to issue proclamations and executive orders regulating the persons, property and procedural rights of the general public, or any segment thereof, outside the executive branch of the state government itself. Instead, the General Court has preferred to rely on delegations of regulatory authority to state administrative agencies and quasi-judicial agencies to implement policies and programs ordained by statute. That authority is wielded within the framework of procedural and other safeguards mandated by the State Administrative Procedure Act and other controlling laws.

Conflicts Over Gubernatorial Executive Orders in Massachusetts

As governors have resorted increasingly to the use of executive orders in Massachusetts, disputes have arisen over allegations that some of these orders have infringed the powers reserved to the General Court by the Constitution by taking on aspects of "executive law-making" contrary to the Separation of Powers Article of the Constitution (Part I, Art. XXX).

Executive Order No. 74 of 1970. On July 16, 1970, Governor Francis W. Sargent established, by Executive Order No. 74, a "Governor's Code of Fair Practices," requiring state agencies to institute affirmative action programs in relation to the administration of their personnel, services, contracts, regulatory activities and programs affecting local government. The order also imposed affirmative action requirements upon private enterprises and educational institutions participating in state programs, and upon local school committees.

In 1973, Attorney General Robert H. Quinn ruled invalid the provisions of this executive order applying to local school committees, on

the grounds that the inherent authority of the governor as supreme executive magistrate does not extend to the regulation of local government, absent an appropriate enabling statute. The Attorney General concluded that the Municipal Home Rule Amendment reserves to the General Court alone the ultimate authority to prescribe standards of municipal government. The General Court had enacted laws outlawing discrimination at the local government level, but had passed no law obliging local government to institute affirmative action practices.

Executive Orders Nos. 172 of 1979 and 189 of 1980. These two executive orders, issued by Governor Edward J. King, addressed two successive, substantially identical, crises which arose when spending by the Massachusetts Bay Transportation Authority (MBTA) outpaced its annual budgets for those fiscal years, as approved by the MBTA Advisory Board. When the latter refused to provide the full amounts of supplementary appropriations sought by the MBTA, a shut-down of the transit system threatened. To forestall these interruptions of service, the governor issued the foregoing executive orders placing the Authority under direct state administration, and authorizing spending in excess of the budgets approved by the Advisory Board. The latter body, and various other parties, challenged the executive orders in court.

Early in 1981, the Supreme Judicial Court invalidated the two gubernatorial executive orders, on the grounds that the statutes granting the governor emergency powers to take over direction of the MBTA do not include, among the emergencies therein enumerated, emergencies caused by budget disputes between the Authority and its Advisory Board. Hence, the Court concluded that the governor had exceeded his powers as supreme executive magistrate by suspending requirements of the MBTA statutes without clear and specific statutory sanction by the General Court.

Gubernatorial Executive Orders in Other States

Constitutional Provisions

The constitutions of 40 of the other 49 states are wholly silent on the subject of the governor's authority to issue executive orders. Hence, in those jurisdictions, the governor must rely upon statutes specifically authorizing such orders, or upon judicial interpretations of his constitutional authority as chief executive, enforcer of state laws, and commander-in-chief, for his power to promulgate executive orders (Ala., Ariz., Ark., Calif., Colo., Conn., Del., Ga., Ha., Ida., Ind., Ia., Ky., La., Me., Minn., Miss., Mont., Neb., Nev., N.H., N.J., N.M., N.Y.,

N.D., Ohio, Okla., Ore., Pa., R.I., S.C., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis., and Wyo.).

Nine additional states, and one territory, have constitutional provisions specifically authorizing their governors to issue executive orders, proclamations or other directives of like character (Alas., Fla., Ill., Kan., Md., Mich., Mo., N.C., S.D., and No. Mar.). In this group are eight jurisdictions whose constitutions, like that of Massachusetts, authorize their governors to reorganize executive branch agencies by means of "plans" or executive orders which take effect unless vetoed by the legislature (Alas., Ill., Kan., Md., Mo., N.C., S.D., and No. Mar.). Another state, Michigan, affords specific constitutional authority to its governor to issue executive orders reducing state spending if state revenues are insufficient to support that spending in any fiscal year. Constitutional provisions in Florida enable its governor, by executive order, (a) to suspend certain state, county and municipal officials from office on certain enumerated grounds, (b) to waive certain fines and forfeitures, (c) to grant commutations, reprieves and pardons, and (d) to restore civil rights.

Statutory Provisions

Much diversity exists among state statutes authorizing gubernatorial executive orders. Most common on this score are laws which confer special powers upon governors in respect to civil defense, natural and man-made disasters, and other emergencies posing serious threats to the public safety. Next are laws granting authority to governors to promulgate executive orders in respect to various specified aspects of state administration and finance, including (a) state executive branch organization, (b) the creation of advisory, coordinating, study or investigative commissions, (c) state participation in federal aid programs, (d) personnel administration, (e) state fiscal administration, and (f) other miscellaneous topics. Finally, scattered statutes here and there authorize governors of certain states to issue executive orders relating to private financial institutions, environmental matters, wild-life and local and regional government.

At least two states have enacted laws establishing uniform standards for the issuance of gubernatorial executive orders (Ida. and Minn.). Twelve states have statutory requirements relative to the filing, recording and publication of gubernatorial executive orders (Ida., Ky., La., Md., Mich., Minn., Miss., N.C., Pa., Tenn., Va., and Wis.). The laws of at least seven states require gubernatorial executive orders, or certain of them, to be submitted to committees or officers of their

legislatures, for the information of the legislature, or for legislative review (Ky., Md., Mo., N.C., Ohio, Tenn., and Vt.).

Litigation Over Gubernatorial Executive Orders

Disputes over the propriety and constitutionality of gubernatorial executive orders are not unique to Massachusetts. They have been occurring in other states with increasing frequency, as governors have expanded their use of executive orders, emulating the tremendous growth in the use of such orders by the President since the Great Depression. The available data show a sharp upswing in the use of gubernatorial executive orders since the early 1960's.

Governor George C. Wallace of Alabama used executive orders as a means of defying federal authorities in school desegregation controversies of the 1960's. In 1970, the Colorado Supreme Court held unconstitutional a gubernatorial executive order involving the state in a federal program without prior state legislative approval. In 1978 and 1979, the New York Court of Appeals held unconstitutional two executive orders of Governor Carey dealing with state personnel and the letting of state contracts, because these orders went beyond the administration of the law, to become attempted "executive law-making."

Gubernatorial executive orders have stirred up legal and political controversies in 14 other states as well (Alas., Calif., Ill., Kan., Ky., Minn., Miss., N.H., N.J., Okla., Pa., Tex., W.Va., and Wis.). In substantial degree, these orders have been upheld. To pass judicial muster, the governor's order has to be an exercise of powers conferred on him, expressly or by clear implication, by the state constitution and statutes, and may not invade the constitutional realms of the legislature or the courts. When an executive order is specifically authorized by statute, it must not go beyond that law.

Presidential Executive Orders

Legal Bases

Constitutional Provisions. The United States Constitution makes no mention of presidential executive orders. The President's power to promulgate executive orders is derived from two different sources: his independent powers under the Constitution and statutes enacted by Congress. A given presidential executive order may be based on one, the other, or both types of such authority. The latter is true when the President and Congress share jurisdiction over given functions and subjects.

The Federal Constitution provides that the "executive" power shall

be vested in the President, but does not designate him as "chief executive" or "supreme executive magistrate" (Art. II, s. 1). As such, he is commanded to "take care that the laws be faithfully executed" (Art. II, s. 3). He has a constitutional right to require information of his agency heads (Art. II, s. 2). He has broad constitutional powers in respect to the conduct of relations with foreign states (Art. II, s. 2; Art. III, s. 3). And he is, by constitutional mandate, commander-in-chief of the nation's armed forces (Art. II, s. 2).

Statutory Provisions. Numerous federal statutes specifically authorize the President to implement their policies and provisions through the issuance of regulations, proclamations and presidential executive orders.

Such delegations of "legislative power" by the Congress take both explicit and implied forms. In its explicit form, that power is expressly delegated by statute. The United States Supreme Court has held that when the President is exercising authority delegated to him by statute, he is merely acting as the agent of the Congress; and the Court has indicated that Congress need only state the purposes which it seeks to accomplish in the delegatory statute. Further, such a delegatory statute must either (a) include standards which are sufficiently exact to enable those affected to understand the limits of the power delegated, or in lieu of such standards, (b) contain procedural safeguards adequate to prevent arbitrary and capricious uses of the authority delegated.

It has been held, judicially, that in delegating authority to the President, it is sufficient for Congress to legislate as far, and as practicable, as necessity warrants, while leaving the details to be worked out by the President and executive branch agencies. The Court has drawn no clear boundary line beyond which a delegation of power by the Congress to the President would do violence to the separation of powers by enabling him to be a lawmaker as well as a law-administrator.

The Court has also indicated that, in certain situations, the President may issue regulations, proclamations and presidential executive orders under an implied delegation of power by Congress. A long-continued practice of Presidents in acting on certain matters without specific statutory authorization, coupled with the acquiescence of Congress, raises the presumption of Congressional consent to such Presidential actions, and Congressional recognition of such actions as fully within the administrative power of the President. This presumption lasts until Congress asserts its legislative prerogative to regulate or prohibit those Presidential actions.

Use of Presidential Executive Orders

Presidents have been issuing executive orders, or proclamations and other directives with like characteristics, since the Administration of George Washington. President Abraham Lincoln made broad use of this power during the Civil War. With the advent of the New Deal, the use of presidential executive orders was greatly expanded to cope with the exigencies of the Great Depression and World War II. Subsequent crises, and the burgeoning of federal programs, has continued this trend since then.

Until the 1920s, little was done to standardize presidential executive order procedures. Efforts on that scope were initiated by President Warren G. Harding in 1921-23, and further developed by Presidents Herbert Hoover, Franklin Delano Roosevelt and Harry S. Truman, who adopted executive orders regulating the preparation and issuance of presidential executive orders. This system was totally overhauled by President John F. Kennedy in his Executive Order No. 11030 of 1962, since amended, which now controls the presidential executive order process.

The present numbered series of presidential executive orders, which began in 1862, includes approximately 12,200 such orders, many of which have lapsed or have been repealed, while still others amended prior presidential executive orders.

Presidential Executive Order Procedure

Under the procedures prescribed by President Kennedy's Executive Order No. 11030, as amended, federal officials and agencies desiring issuance of a presidential executive order must prepare the same in compliance with uniform style standards, and transmit the same to the Office of Management and Budget (OMB) together with an explanation of the proposed order, and certain supporting information.

The OMB reviews the proposed presidential executive order for (a) compliance with Administration policies, (b) its budgetary and fiscal impact, and (c) any problems likely to arise in its practical administration and implementation. The measure is circulated to other federal agencies which would be affected by it, and inter-agency consultation may follow. If not vetoed by OMB, the proposed presidential executive order, with or without amendments, is then transmitted to the Department of Justice for review by that agency's Office of Legal Counsel (OLC).

The OLC considers only the legal aspects of the document, and does not get into the policy domain. If the OLC discovers legal defects in the proposed order, it is returned to the OMB with an indication of those

defects. If the order is returned later to the OLC with changes, legal scrutiny by the OLC is repeated. Once a proposed presidential executive order clears the OLC, it is submitted to the President for his final action. If the OMB or originating agency insists upon a presidential executive order notwithstanding OLC legal objections, OLC forwards to the President a legal memorandum stating the objections of the Department of Justice.

When a presidential executive order receives the President's signature, it is transmitted to the Office of the Federal Register for publication in the Federal Register.

The Commonwealth of Massachusetts

GUBERNATORIAL EXECUTIVE ORDERS

CHAPTER I. INTRODUCTION

Legislative Study Directive

House, No. 6782, the joint order requiring this study by the Legislative Research Council relative to the constitutional and statutory authority of the governor to issue executive orders having the force of law, was introduced into the House of Representatives on June 27, 1980 by the House Chairman of that Council, Representative Michael J. Lombardi of Cambridge. This joint order was approved by the Committees on Rules of the two branches, acting concurrently, and was adopted by the House of Representative, on that same day. Adoption of the study directive by the Senate, in concurrence, followed on June 30, 1980.

This report, resulting from the above study mandate, is the first examination of gubernatorial powers to issue executive orders to have been authorized by the General Court. It reflects an increasing legislative interest in the growing recourse of governors to use of the executive order device since World War II, and the implications of that device for the constitutional separation of powers among the legislative, executive and judicial branches of the state government, the constitutional system of checks and balances, and legislative oversight of operations of the executive branch of the state government.

That legislative interest has been heightened by recent litigation challenging the use of executive orders by His Excellency, Governor Edward J. King, to assume direct control of the management and operations of the Massachusetts Bay Transportation Authority (MBTA) and to authorize expenditures by that agency in excess of budgets approved by the MBTA Advisory Board (composed of representatives of the municipalities belonging to the Authority).¹ The

1. Executive Orders Nos. 172 of December 18, 1979 and 189 of November 18, 1980; *Massachusetts Bay Transportation Authority Advisory Board, et al., v. King*, Supreme Judicial Court, Suffolk SS, No. 2259, Nov. 1980; *Massachusetts Bay Transportation Authority Advisory Board v. Massachusetts Bay Transportation Authority, et al.* Superior Court, Suffolk SS, No. 45001, Nov. 1980, and Supreme Judicial Court No. 2353, Nov. 1980.

plaintiffs in these suits, recently decided by the Supreme Judicial Court, allege, among other things, that the Governor exceeded his statutory authority and undertook an exercise of powers reserved to the General Court alone by the Constitution, in promulgating these executive orders.

Gubernatorial Executive Orders Defined

In Massachusetts, as in all other states whose practices on this score have been reported to the Legislative Research Bureau, there are no formal definitions of the term "executive order" or "proclamation" in the state constitution, and few such definitions in the statutes. In certain instances, gubernatorial "proclamations," like certain proclamations of the President of the United States, have "executive order" characteristics.

For the purposes of this study, the term "gubernatorial executive order" is defined as any written or printed order, directive, rule, regulation, proclamation or other instrument promulgated by the governor of a state (a) in the exercise of his constitutional authority as "chief executive" or "supreme executive magistrate," (b) in fulfillment of his constitutional duty to enforce state laws, (c) in performing constitutionally assigned duties relative to executive branch reorganization, (d) in the exercise of his constitutional responsibilities as commander-in-chief of the armed forces and civil defense forces of the state, as regulated by state law, and (e) in his role as "agent" of the state legislature in exercising powers delegated to him by statute to implement and administer particular state laws and programs.

Gubernatorial executive orders and "proclamations" may be ceremonial, or may amount to little more than public relations exercises. Or, they may be substantive instruments with the force of law. Some gubernatorial executive orders are indistinguishable from rules and regulations issued by regulatory and quasi-judicial agencies of the state executive branch, apart from the fact that those orders emanated directly from the governor himself.

Proclamations by a governor may or may not have the characteristics of gubernatorial executive orders. On this score, a Wisconsin study notes that —

Executive orders differ from proclamations. Wisconsin governors traditionally have used proclamations for ceremonial purposes, such as honoring groups, individuals,

causes or holidays or for calling the legislature to attend a special session. By contrast, executive orders have been used to initiate policy changes and to manage state government.¹

Proclamations may also be used to invoke or to activate otherwise "dormant" constitutional and statutory provisions, with very significant legal consequences. Among the gubernatorial and presidential proclamations of this sort which come to mind are those establishing martial law, proclaiming civil defense emergencies, taking over public utilities threatened by labor disputes, dedicating public property to particular uses, and calling special elections. At the national level, presidential proclamations are used to put into effect treaties, conventions and protocols which become thereby a part of the "supreme law of the land";² such proclamations activate international agreements of lesser stature, such as executive agreements on foreign trade matters.

Study Procedure

This Legislative Research Council report discusses gubernatorial and presidential executive orders in the seven following chapters dealing respectively with (a) British and Colonial orders in Council, (b) the growth of the authority of the Massachusetts Governor since 1780, (c) the constitutional bases of gubernatorial executive orders in Massachusetts, (d) the statutory bases of gubernatorial executive orders in Massachusetts, (e) other aspects of gubernatorial executive orders in Massachusetts, (f) gubernatorial executive orders in other states, and (g) executive orders of the President of the United States. Appendix A hereof presents, for the first time, a complete chronological index of the 291 executive orders issued by Massachusetts governors from 1941, when the systematic numbering of such orders was initiated by Governor Leverett Saltonstall (1939-45) to December 31, 1980.

The modest length of this report reflects the limited extent to which the whole subject of gubernatorial executive orders has been explored in depth previously in Massachusetts and most other states by legislative research agencies, law journals and the courts. Judicial case law at the federal and state levels in relation to executive orders is not extensive, and leaves many important questions as yet unanswered. A bibliography of materials on this subject, collected by the Legislative Research Bureau, appears in Appendix C.

1. Susan B. King, "Comment — Executive Orders of the Wisconsin Governor," *Wisconsin Law Review*, Vol. 1980, No. 2, Law School of the University of Wisconsin, Madison, Wis., pp. 333-365; at p. 333, fn. 2.

2. U.S. Const., Art. VI.

To develop the background of this study, the Legislative Research Bureau staff conferred at length with Assistant Attorney General Donald K. Stern, Chief of the Government Bureau of the Massachusetts Attorney General's Department and Mr. Curt C. Pfunder, Esq., Assistant Legal Counsel to the Governor, both of whom furnished research materials as well. Discussions also took place with former State Commissioner of Administration and Finance, Mr. William A. Waldron, Esq., and members of the staff of the Office of General Counsel of the State Department of Public Health, who provided valued information. In addition, the Archives Division of the Department of the State Secretary gave the staff of the Legislative Research Bureau access to the Division's files of gubernatorial executive orders, generously providing copies of certain of those orders as requested.

The Bureau staff member responsible for preparing this report also attended the session of the Supreme Judicial Court, held on November 5, 1980, at which attorneys for the contending parties presented their arguments for and against Governor King's Executive Order No. 172 of 1979 assuming control of the MBTA.

Further, at the request of the Legislative Research Bureau, the Data Processing Section of the Legislative Service Bureau provided a computer print-out of Massachusetts statutory provisions relative to the governor's authority to issue executive orders.

Information and materials relative to the practices of the other 49 states in respect to gubernatorial executive orders were furnished by the National Conference of State Legislatures and by the research, reference and fiscal agencies of the legislatures of those states, in response to letters and questionnaires sent out by the Massachusetts Legislative Research Bureau. Materials received from other states included legislative staff memoranda, interim commission reports, law review articles, opinions of attorneys general, and the texts of certain state supreme court opinions, relative to executive orders, all of which are listed in the bibliography in Appendix C of this report.

Finally, to obtain information and materials as to the formulation, adoption and uses of executive orders of the President of the United States, the Bureau staff member assigned to this study conferred at length in Washington, D.C., with Mr. Stephen Wilkerson, Attorney Advisor in the Office of Legal Counsel of the United States Department of Justice, and Mr. Ronald Kienlen, Assistant General Counsel in the Office of Management and Budget.

To all of the foregoing officials, agencies, organizations and private individuals who cooperated so generously in this study, the Legislative Research Bureau expresses its warm appreciation and deep gratitude.

CHAPTER II. BRITISH AND COLONIAL ORDERS IN COUNCIL

Writs and Orders in Council Under British Law

Roots of American Practice in British Law

Executive orders of the governors of Massachusetts and other states, and of the President of the United States, have their legal origins in British "unwritten" constitutional law and common law traditions concerning the issuance of "writs" and "Orders in Council" by English monarchs. These traditions, based on a merging of the legislative, executive and judicial powers of government in England, were carried to the New World by British settlers and were applied in modified form to their respective colonial governments. When the states, and eventually the federal, governments came into being after 1776 under constitutions separating the three fundamental powers of government, there was a movement away from British legal practice. However, as will be indicated in this report, developments in the United States since the Great Depression reveal a partial return toward uses of presidential and gubernatorial executive orders resembling British practices.

Writs

The original ancestor of the executive order was the "writ" issued by the Anglo-Saxon monarchs (A.D. 700-1066), in the exercise of their royal prerogative, to various officials directing them in their administrative and judicial duties, and implementing laws promulgated by the king with the consent of his royal council of nobles (*Witanegamot*). After the Norman Conquest in 1066, William I (1066-87) replaced the *Witanegamot* with a *Curia Regis* composed of the nobles and leading clergy of the realm. Eventually that body evolved into Parliament with the addition to its membership of burgesses representing the boroughs (chartered cities) in 1265, and knights representing the shires (counties) in 1295. Unlike the *Witanegamot*, the *Curia Regis* had no veto power over the decisions of the king, and was advisory only. Eventually, it was given certain judicial functions. In the meantime, the king con-

tinued the practice of issuing writs to direct the administration of the realm. Thus, the legislative, executive and judicial authority of the country were firmly settled in the monarch himself.

Orders in Council

When the *Curia Regis* grew in membership and proved too cumbersome administratively, Henry I (1100-35) organized within it an executive committee composed of his personal administrative officials and the more important nobles and clergymen, to advise and assist him in the day-to-day administration of the realm. To this committee, originally called the "Small Council" and later the "Privy Council," the king delegated certain legislative, executive and judicial duties as well. Exercises of royal authority "by and with the advice and consent" of Parliament came to be designated as "acts" and "statutes" of the kingdom. Decrees, laws, regulations, writs, and other administrative and judicial directives formulated by the king in consultation with his Privy Council were classified as "proclamations," "writs," "ordinances" and eventually as "Orders in Council." Based in the common law of England, Orders in Council were powerful instruments of royal authority in eras of weak Parliaments.

With the Glorious Revolution of 1688, and the final downfall of the absolutist Stuart Dynasty, the supremacy of Parliament was established in fact, although the outward forms of royal authority were preserved in modified form. As the parliamentary system of government evolved thereafter, Parliament entrusted executive functions of the Crown to a "Ministry" or "Government" consisting of a Prime Minister and Cabinet, whose members were usually selected from among the members of the two Houses of Parliament. By custom, the Prime Minister and his cabinet officers became automatically members of the Privy Council, with effective control over its decisions. The Privy Council thus became the *alter ego* of the Cabinet for executive and some judicial purposes, its "advice" to the sovereign being almost wholly binding on him.

As modified by these historical events, Orders in Council evolved into exercises of "inherent" legislative and executive powers of the Crown derived from British common law. While largely independent of the immediate control of Parliament, these powers continued only by sufferance of that body. At the time of the American Revolution, this evolutionary process had not run its full course, and the authority

of the "King in Council" to issue Orders in Council was still substantial. In addition, the Privy Council possessed broad authority over the British colonies, including the authority to approve, alter and reject laws enacted by the Massachusetts General Court and other colonial legislative bodies.

Resentment against decisions of the Privy Council was a factor in the decisions of post-1776 state constitutional conventions, and the National Constitutional Convention held in Philadelphia in 1787 to separate the legislative, executive and judicial powers of government. The latter convention also rejected suggestions for the establishment of an executive council, privy council or any like body in the constitutional framework of the federal government.

Subsequent to the American Revolution, the independent legislative authority of the Privy Council in Great Britain was diminished by Parliament. Today, Orders in Council are issued almost wholly pursuant to enabling acts of Parliament, for the purpose of implementing provisions of those acts and programs authorized by law. Such Orders in Council are subject in most instances to procedural and other safeguards similar to those controlling the formulation of rules and regulations by British regulatory agencies under statutory authority.

Executive Orders of Colonial Governors of Massachusetts

Merged Legislative, Executive and Judicial Powers

The colonial charters of Massachusetts granted by Charles I in 1628 and by the joint sovereigns William III and Mary II in 1691, followed British precedents by merging legislative, executive and judicial powers in the structure of the colonial government.

Like Parliament, the General Court *included* the principal executive officers of the government, and also functioned at times as judicial body. The General Court created by the 1628 charter included (a) a Governor, Deputy Governor, and 18 Assistants elected annually by the freemen of the Colony, and (b) all the freemen or "members of the Company" of the Colony. It thus resembled a large open town meeting. In 1634, the latter open membership of freemen was replaced by deputies elected from each town by the freemen thereof.

The Province Charter of 1691 replaced the locally-elected executive officials of the Colony with (a) a Governor, Deputy or Lieutenant Governor, and Secretary, named by the Crown to serve during royal

pleasure, and (b) 28 Councillors elected annually by the General Court under a formula apportioning Council seats to major component geographical areas of the Province.¹ The reconstituted General Court included those executive officers, plus two representatives elected from each town. As had happened with Parliament, the General Court originally sat as a unicameral body, but gradually adopted a bicameral method of operation (not specified by the colonial charters) as the Governor and Assistants (Councillors) on the one hand, and the deputies or representatives on the other, began to sit as separate chambers.

Executive Orders of Governor and Council

Both colonial charters required the Governor to convene regular periodic sessions of the General Court, and permitted him to call special sessions of that body. The two charters vested in the General Court the power to make "laws" and "ordinances" not repugnant or contrary to the laws of England. The charters assigned to a governing board consisting of the governor, Deputy Governor (Lieutenant Governor), and Assistants (Councillors) the responsibility for the day-to-day management of the Colony or Province.

By implication, the charters required these officers to administer and enforce the laws of the Colony or Province in such manner as they deemed appropriate, consistent with these charters and English law. The two charters did not designate the Governor as "chief executive" or "supreme executive magistrate", as in those days such titles would have been considered proper only as applied to the king. The Governor presided over meetings of the "Court of Assistants" (Governor's Council). Under the Province Charter of 1691, he possessed an absolute veto over measures enacted by the General Court, and he was given broad authority to adjourn, prorogue or dissolve the General Court.

The war powers of the Governor were considerable. The Province Charter of 1691 designated him commander-in-chief of the armed forces of the Province, with the power to appoint their officers. He was authorized to proclaim martial law, with the approval of the Council. However, he could not send the armed forces of the Province outside it

¹ The Province Charter of 1691 consolidated into a single "Province of Massachusetts Bay in New England" the following formerly separate colonies: Massachusetts Bay Colony, the New Plymouth Colony, the District of Maine, and Nova Scotia (which then included New Brunswick and Acadia). In addition, the Elizabeth Islands, Martha's Vineyard and Nantucket were transferred from New York to the Province of Massachusetts Bay.

without the consent of the General Court. And he was dependent upon that body for the levying of taxes, and the appropriation of funds, needed for military purposes.

In the early days of the Colony, the Governor and "Court of Assistants" issued "orders," much in the manner of the Privy Council, covering a wide range of subjects, and involving, variously, uses of legislative, executive and judicial powers. Among the matters so addressed were: (a) the armed defense of the colony, and the regulation of its armed forces; (b) the definition of crimes and misdemeanors, and the establishment of punishment therefor; (c) the employment and compensation of public officials and employees; (d) the regulation of trades, industry, and commerce; (e) the regulation of agriculture; (f) the regulation of buildings; (g) the establishment and alteration of boundaries of political subdivisions; and (h) the maintenance of the orthodox Protestant clergy and "meeting houses" (churches).

In later Colonial days, the General Court assumed jurisdiction of most of these subjects *via* statutory enactments. Until the General Court spoke on a particular subject, the Governor and Council were considered possessed of "inherent" authority under the charters to adopt legislative, administrative and even judicial "orders" on that subject, so long as limitations imposed by the charters and English Law were respected. This "inherent authority to issue "orders" was never clearly defined.

Following the Boston Tea Party, Parliament sought to increase gubernatorial authority by substituting gubernatorially-appointed Executive Councillors for those formerly elected by the General Court, and by permitting the governor to name or remove judicial officers without council consent.¹ When armed conflict broke out at Concord and Lexington on April 19, 1775, the Governor (General Thomas Gage) invoked his war powers in an unsuccessful attempt to crush the Revolution. Because of military reverses, which eventually forced the British to evacuate their forces from Boston, the Governor was unable to avail himself of sweeping powers conferred on British governors in the rebellious American Colonies by George III and his Privy Council in a proclamation in August of 1775.

1. Massachusetts Government Act of 1774; D. Pickering, *Statutes at Large*, Vol. XXX, pp. 381ff, May 20, 1774

CHAPTER III. GROWTH OF AUTHORITY OF MASSACHUSETTS GOVERNOR SINCE 1780

General Aspects

The powers and duties of the Governor of Massachusetts are governed by the Massachusetts Constitution of 1780, the World's oldest operating written constitution, which has been altered by 115 articles of amendment over the past two centuries. That document is silent on the subject of gubernatorial executive orders; but as will be developed in the following chapter of this report, the Governor's authority to issue executive orders is implied in his constitutional role as "supreme executive magistrate" and commander-in-chief of the armed forces of the state, and in his constitutional obligations to enforce the laws of the state.

In its original form, the Massachusetts Constitution provided for a relatively weak governorship. It sought to protect the liberties of the people by separating the legislative, executive and judicial powers of the state government along sharp lines. Moreover, it divided responsibilities and authority within the executive branch of state government between the Governor, the Executive Council, and certain "constitutional" executive officers, thus making the Governor more the "chairman of the board" than "executive director of the executive branch." Subsequently, in the current century, constitutional amendments and statutes increased the legal, administrative and political "clout" of the Governor as chief executive, and added to his constitutional authority and responsibilities.

Constitutional Authority Shared Between Governor and Executive Council

While the Constitution required popular election of the Governor and Lieutenant Governor, it provided for the election of nine Executive Councillors by the General Court from among the members of the Senate.¹ These latter officers, with the Lieutenant-Governor, comprised the Executive Council (hereinafter referred to as "the Council"). Subsequently, in 1855, the Constitution was amended to replace the foregoing nine indirectly-elected Executive Councillors with eight such

1. Mass. Const., Part II, c. II, Art. I (1780).

Councillors elected by the people from eight districts.¹ The constitutional sharing of responsibilities between the Governor and Council, changed only modestly since 1780, have been summarized as follows in another report of the Legislative Research Council:²

The constitutional powers of the Council consist of two principal types, viz: (1) powers of approval of gubernatorial acts, and (2) powers exercised by the Governor and Council functioning as an executive board.

Most of the constitutional powers of the Council fall in the former category of Council approval of gubernatorial acts. This approval extends to: (1) the appointment, removal, or retirement because of age or disability, of judicial officers;³ (2) expenditures from the state treasury, excluding debt service;⁴ (3) pardons;⁵ (4) the convening and proroguing of the General Court;⁶ (5) the appointment of medical examiners;⁷ (6) the appointment and removal of notaries public and justices of the peace;⁸ and (7) the filling of vacancies, which occur between legislative sessions, in the state-wide elective offices⁹ . . .

The second category, of constitutional powers and duties of the Governor and Council sitting as an executive board, consists of: (1) swearing in legislators;¹⁰ (2) canvassing certain state election returns;¹¹ (3) punishing persons who are disrespectful of the Council or who threaten or assault its members;¹² (4) requiring attendance of the State Secretary at Council meetings.¹³

1. Mass. Const., Amend. Art. XVI (1855).

2. Mass. Legislative Research Council, *Constitutional and Statutory Powers of the Executive (Governor's) Council*, Boston Mass., April 16, 1964, 54pp.; at p. 5.

3. Mass. Const., Part II, c. II, s. I, Art. IX (1780); Part II, c. III, Art. I (1780); Amend. Art. LVIII (1918).

4. Mass. Const., Part II, c. II, s. I, Art. XI (1780).

5. Mass. Const., Part II, c. II, s. I, Art. VIII (1780).

6. Mass. Const., Part II, c. II, s. I, Art. V and VI (1780).

7. Mass. Const., Part II, c. II, s. I, Art. IX (1780).

8. Mass. Const., Amend. Arts. IV. (1821) and XXXVII (1907).

9. Mass. Const., Amend. Arts XVII (1855) and LXXIX (1948).

10. Mass. Const., Part II, c. VI, Art. I (1780).

11. Mass. Const., Part II, c. I, s. II, Art. III (1780); Amend. Art. XVI (1855).

12. Mass. Const., Part II, c. I, s. III, Art. XI (1780).

13. Mass. Const., Part II, c. II, s. IV, Art. II (1780).

Until 1964, the Governor and Council had to act concurrently to request an advisory opinion of the Supreme Judicial Court.¹ A constitutional amendment ratified by the voters in that year now permits solicitation of such opinions by the Governor alone, or by the Council alone.² Until laws were enacted on the subject by the General Court, the Governor and Council were authorized to perform the judicial function of hearing and settling marriage, divorce and alimony cases, and all appeals from the probate courts.³

Numerous statutes enacted from 1780 to 1964 required the Governor to obtain the "advice and consent" of the Council in respect to (a) his appointment and removal of department heads and certain other officers of the executive branch of the state government, (b) the fixing of the compensation of such officials, (c) the approval of rules and regulations of state regulatory agencies, and (d) a variety of fiscal and state property management transactions. Nearly all of these laws were repealed by an initiative statute of 1964 sponsored by the Massachusetts Federation of Taxpayers Association, the League of Women Voters of Massachusetts, and the Massachusetts Junior Chamber of Commerce.⁴

Constitutional Status and Authority of Lieutenant-Governor

The Lieutenant-Governor, who has been popularly elected since 1780, has few constitutionally-assigned duties. He presides over meetings of the Executive Council when the Governor is not present thereat.⁵ And he serves as "acting governor" when the office of Governor falls vacant by reason of the death, disability, or absence from the state of the Governor.⁶ It is unclear in the Constitution as to just how extensive the Lieutenant-Governor's authority as "acting Governor" is, when the Governor is travelling out-of-state, to countermand or contravene orders of the latter. By clear constitutional implication, the Lieutenant-Governor, as "acting governor," possesses the authority to issue executive orders while so acting.⁷ On his return to the state, the Governor may modify or revoke such executive orders, by the exercise of his constitutional powers.

1. Mass. Const., Part II, c. III, Art. II (1780).

2. Mass. Const., Amend. Art. LXXXV (1964).

3. Mass. Const., Part II, c. III, Art. V (1780).

4. Act of 1964, c. 740.

5. Mass. Const., Part II, c. II, s. II, Art. II (1780).

6. Mass. Const., Part II, c. II, s. II, Art III (1780). Amend. Art. XCI (1968).

7. *Opinions of the Justices*, 135 Mass. 594 (1883).

The statutes restate, in some greater detail, the Lieutenant-Governor's few constitutional duties, but confer no significant additional powers and duties upon him. Hence, aside from presiding over the Council, his authority is largely limited to what the Governor opts to delegate to him.¹

Twentieth Century Strengthening of the Governorship

Constitutional amendments adopted in 1918 and 1964-66 have greatly enhanced the Governor's control over the organization, operations and policies of the executive branch of the state government.

On recommendation of the popular Constitutional Convention of 1917-19, Massachusetts voters ratified constitutional amendments in 1918 which (a) provided for the election of the Governor, Lieutenant-Governor, State Secretary, Treasurer, Auditor, Attorney General, Executive Councillors, and state legislators for two-year terms, instead of annually as before; (b) established a unified state budget system, and a centralized administration of state finances, with increased gubernatorial control in these areas;² and (c) mandated the organization of the executive branch into 20 departments, exclusive of officers serving directly under the Governor and Council.³ These constitutional changes were supplemented by statutes reorganizing the executive branch, and creating a State Commission on Administration and Finance.⁴ That latter agency was replaced in 1962 by the present Executive Office for Administration and Finance, headed by a single Commissioner who became the Governor's chief administrative deputy for the day-to-day management of the executive branch.⁶

More significant yet were constitutional amendments ratified in 1964 and 1966. Two-year terms of office for the Governor, Lieutenant-Governor and four constitutional officers yielded to four-year terms,⁷ and provision was made for the "joint" or "team" election of the Governor and Lieutenant-Governor.⁸ Substantial authority was granted to the Governor to reorganize agencies of the executive branch

1. See Mass. Legislative Research Council report, *Duties and Powers of the Lieutenant Governor*, Senate No. 1224 (1972), 53 pp.

2. Mass. Const., Amend. Art. LXIV (1918).

3. Mass. Const., Amend. Art. LXIII (1918).

4. Mass. Const., Amend. Art. LXVI (1918); annulled by Amend. Art. LXXXVII, s. 3 (1966).

5. Acts of 1919, c. 350; Acts of 1922, c. 545.

6. Acts of 1962, c. 757.

7. Mass. Const., Amend. Art. LXXX (1964).

8. Mass. Const., Amend. Art. LXXXVI (1966).

by means of "reorganization plans" subject to veto by either branch of the General Court.¹ Follow-up statutes have instituted a "cabinet" or "secretariat" system of executive branch organization under strong gubernatorial control.² The degree of "insulation" from gubernatorial control previously enjoyed by statutory officers and agencies within the executive branch has been reduced sharply or eliminated by removal of the Executive Council's power of approval over gubernatorial appointments of non-judicial officials,³ and by measures making the terms of office of heads of executive branch agencies coterminous with the term of office of the Governor.⁴

Growth of Governor's Supervisory Responsibilities

These enlargements of the Governor's authority were accompanied by growing gubernatorial supervisory responsibilities, as the scope of state government activities expanded after 1950. Population growth, and the multiplication of federal aid programs, increased state activity in the areas of the social services, higher education, mass transportation, urban development and environmental protection. The advent of the Cold War compelled an expansion of the war and peacetime emergency powers of the Governor.⁵ In 1967, local welfare departments were abolished and their functions transferred to the State Department of Public Welfare.⁶ And in 1978, the state assumed direct responsibility for court costs and administration previously borne by the 14 counties.⁷

During the 30-year period from 1950 to 1980, annual state expenditures exclusive of local aid rose from \$199.6 million to over \$4.1 billion. The number of officers and employees of the executive branch of the state government increased from about 39,000 to slightly over 70,000. And the count of statutory units of the executive branch, and of independent agencies (public authorities, etc.) subject to gubernatorial oversight, soared from 138 in 1950 to well over 300 by 1980. With this growth of the executive branch and gubernatorial responsibility, the Governor has had greater recourse to the use of executive orders for

1. Mass. Const., Amend. Art. LXXXVII (1966).

2. Acts of 1969, c. 704; G.L. c. 6, s. 17A; G.L. c. 6A.

3. Acts of 1964, c. 740 (initiative law).

4. Acts of 1967, c. 844.

5. Acts of 1950, c. 639.

6. Acts of 1967, c. 658.

7. Acts of 1978, c. 478.

policy, administrative and other reasons. In all, 47 gubernatorial executive orders were promulgated during the 15-year period 1950-64. During the following 16 years, 144 such orders were issued.

CHAPTER IV. CONSTITUTIONAL BASES OF GUBERNATORIAL EXECUTIVE ORDERS IN MASSACHUSETTS

Silence of Constitution on Gubernatorial Executive Orders

The Massachusetts Constitution makes no specific mention of gubernatorial executive orders as such. It does authorize the Governor to submit to the General Court "reorganization plans" relative to executive branch agencies, which take effect unless vetoed by either branch of that body;¹ but these plans, which are classified as "executive orders" in other states, are not so classified here.

In general, the Governor has implied constitutional authority to issue executive orders under provisions of the Massachusetts constitution which (a) designate him as "supreme executive magistrate" with specific and inherent powers as such, (b) imply his constitutional obligation to enforce the laws faithfully, and (c) designate him as commander-in-chief of the armed forces of the state. In addition, the General Court has constitutional authority to enact laws (a) assigning duties and responsibilities to the governor in the discharge of which he acts as the agent of that body, and (b) defining his war and emergency powers. In these latter connections, the General Court may authorize the issuance of executive orders by the Governor. Executive Council approval of gubernatorial executive orders is necessary only where required by statute, or where their issuance without that assent would clearly infringe on the reserved constitutional jurisdiction of the Council.²

Authority of Governor as Supreme Executive Magistrate

Constitutional Provisions

Designation as Supreme Executive Magistrate. The Massachusetts Constitution ordains that "There shall be a supreme executive Magistrate, who shall be styled, *The Governor of the Commonwealth of Massachusetts*; and whose title shall be *His Excellency*."³ This provi-

1. Mass. Const., Amend. Art. LXXXVII (1966).

2. *Opinions of the Justices*, 190 Mass. 616 (1906), 368 Mass. 866 (1975).

3. Mass. Const., Part II, c. II, s. I, Art. I (1780).

sion is supplemented by numerous others elsewhere in the Constitution assigning more specific powers and duties to the Governor, some of them involving a sharing of authority with the Executive Council. These specific assignments aside, there is no definition of "executive power" in the Constitution.

Further to the above, a "Grandfather Clause" in the Constitution implies a carry-over to the Governor, under the Constitution, of those inherent executive powers of his Colonial predecessors which, by long usage prior to 1780, had acquired common law status to the extent not in conflict with state constitutional and statutory provisions:

All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.¹

Sharing of Executive Authority by Governor and Executive Council. The Constitution authorizes the Governor to convene meetings of the Executive Council "from time to time at his discretion" for the purpose of "ordering and directing the affairs of the Commonwealth, agreeably to the Constitution and the laws of the land."²

When the Governor and Council act as an executive board, the Governor is merely the presiding member thereof, rather than "supreme executive magistrate." On the other hand, when he is discharging constitutional and statutory duties and functions requiring the advice and consent of the council, he is transacting state business as "supreme executive magistrate." Absent a constitutional or statutory requirement of Council "advice and consent," the Governor acts as "supreme executive magistrate," and it is optional with him as to whether he wishes to seek the advice, information and assistance of the Council, or to be guided by it if it is forthcoming.³

It would appear that the Council would have a role in the adoption of gubernatorial executive orders only (a) if such orders involve an exercise of authority clearly shared between the Governor and Council under specific constitutional provisions and not capable of exercise by

¹ Mass. Const., Part II, c. VI, Art. VI (1780).

² Mass. Const., Part II, c. II, s. I, Art. IV (1780).

³ *Opinions of the Justices*, 190 Mass. 616 (1906).

the Governor alone, or (b) if required by the General Court in laws setting forth “the several duties, powers, and limits, of the several civil and military officers” of the state.¹

Inherent Powers of Governor as Supreme Executive Magistrate

Inherent Powers in Constitution. On this subject, the Supreme Judicial Court has observed that —

... (It) ... is ... clear that it is the constitutional prerogative, as well as the duty, of the Governor to execute the laws. The Governor is ‘supreme executive magistrate’ of the Commonwealth ... The nature of such an office requires that the Governor have authority to use discretion in applying the energies of the executive branch and the resources of the Commonwealth, as such resources are made available by the Legislature, to achieve the purposes or objectives of the laws. The power to execute the laws, constituting the essence of the Governor’s constitutional office, must be accorded the same deference as the several specific executive powers enumerated in the Constitution ...²

“(The Governor) ... has executive powers in the exercise of which the General Court cannot interfere without violating art. 30 of the Declaration of Rights providing that ‘the legislative department shall never exercise the executive and judicial powers, or either of them’. But the General Court may by law, without delegating legislative power, confer other powers of an executive or administrative nature upon the Governor ...³

Specific constitutional authority is vested in the Governor to require civil and military officers and agencies of the state government to account to him with respect to real and other property in their custody, and to “communicate” to him “all letters, dispatches, and intelligences of a public nature, which shall be directed to them respectively.”⁴ This constitutional provision has been interpreted by the Attorney-General to empower the Governor to investigate and regulate the fiscal opera-

1. Mass. Const., Part II, c. I, s. I, Art. IV (1780), as amended by Amend. Art. CXII (1978), *Opinions of the Justices*, 302 Mass. 605 (1939).

2. *Opinions of the Justices*, 375 Mass. 827, 833 (1978).

3. *Opinions of the Justices*, 302 Mass. 605, 616 (1939).

4. Mass. Const., Part II, c. II, s. I, Art. XII (1780), as amended by Amend. Art. LIII (1918).

tions and accounting practices of state agencies, in ways not at odds with state statutes.¹ Presumably, the Governor may issue executive orders to implement his responsibilities in these areas.

Inherent Powers in Common Law. The "inherent powers" passing from the Colonial Era governorship to the Governor of the Commonwealth under the "Grandfather Clause" of the Constitution² remains a "gray area" of uncertain and very limited dimensions.

The Supreme Judicial Court has held that the common law of England, as it existed when the State Constitution was adopted in 1780, has been taken over into the body of Massachusetts law under the "Grandfather Clause," to the extent that such common law does not contravene provisions of the State Constitution, or laws subsequently enacted by the General Court. In ascertaining what this common law is, the Court relies upon tradition, usage, and well known repositories of learning. The enforcement of an English statute in Massachusetts for a long time prior to 1780 is sufficient to show that it was adopted as part of the common law of the Colony and Province. Not every principle of English Common Law has been so carried over, however, as some of its doctrines were rejected as inapplicable to the circumstances of the Colony and Province. Once common law has been superseded by a statute, it is not revived by the repeal of that statute.³

The scope of common law "inherent powers" of the Governor and Council has been diminished nearly to the vanishing point since 1780 by the Separation of Powers Article of the Constitution, statute law, and judicial rulings thereunder. Clearly, the Governor and Council, separately or together, have no common law legislative power. Quite possibly, the 1964 initiative law which stripped the Council of nearly all its powers of approving gubernatorial appointments and removals of executive branch officials, actions of the Governor in fixing the pay of certain of these officials, and other gubernatorial action under statute law,⁴ may be viewed as evidence of voter intent to confine the authority of the council narrowly to those powers clearly stated in the Constitu-

¹ *Op. Atty. Gen.* 1911, p. 346.

² *Mass. Const.* Part II, c. VI, Art. VI (1780).

³ *Commonwealth v. Leach*, 1 *Mass.* (1804); *Commonwealth v. Knowlton*, 2 *Mass.* 530 (1807); *Pearce v. Atwood*, 13 *Mass.* 324 (1816); *Sackett v. Sackett*, 25 *Mass.* 309 (1829); *Boynton v. Rees*, 26 *Mass.* 528 (1830); *Commonwealth v. Marshall*, 28 *Mass.* 330 (1831); *Commonwealth v. Churchill*, 43 *Mass.* 123 (1840); *Commonwealth v. Williams*, 72 *Mass.* 1 (1856); *Commonwealth v. Rowe*, 257 *Mass.* 172 (1926); *Commonwealth v. Lopes*, 318 *Mass.* 453 (1945).

⁴ *Acts of 1964*, c. 740.

tion and statutes, and to strengthen the inherent power of the Governor. Whether a common law "inherent power" formerly exercised jointly by the Governor and Council now continues as a power of the Governor alone remains to be determined judicially.

Supreme Judicial Court Opinion of 1975 re Executive Order No. 114. Involvement of the Executive Council in constitutionally-prescribed actions of the Governor does not preclude issuance by him of executive orders bearing on those actions, so long as the Council is free to perform its constitutional functions.

On January 3, 1975, Governor Michael S. Dukakis issued his Executive Order No. 114 establishing a Judicial Nominating Commission composed of gubernatorial appointees, to advise the Governor in his selection of qualified judicial nominees whose names he would submit to the Council for confirmation as required by the Constitution.¹ Questioning the constitutionality of the executive order, the Council requested an advisory opinion of the Supreme Judicial Court.

In its opinion of September 9, 1975 upholding Executive Order No. 114, the Supreme Judicial Court held that the Governor's responsibility under the Constitution to nominate judicial officers had not been delegated, surrendered, abandoned, or unduly restricted by the executive order in an unlawful manner, notwithstanding a commitment by the Governor in that order to nominate only persons listed in slates of names recommended by the Commission. The Court observed that the Council is required to act upon judicial nominations submitted by the Governor, however he arrives at his decisions.²

The Court concluded that the members of the Commission, whose function was limited to gathering information and making recommendations to the Governor, were not "civil" or "public" officers whose positions could be created only by statute,³ because no part of the sovereign power had been delegated to them by the executive order. Moreover, the Court found that the Governor had acted within his constitutional competence in providing, in the executive order that Commission members be reimbursed for the expenses, so long as this is done from available appropriations. The Court ruled, also, that a commission so created by executive order could be authorized thereby to adopt its own operational procedures and standards.

1. This executive order was subsequently amended by Executive Orders, Nos. 127 (1976) 151 (1979), 154 (1979) and 178 (1980).

2. *Opinions of the Justices*, 368 Mass. 866 (1975).

3. Mass. Const., Part II, c. 1, s. 1, Art. IV (1780), as amended by Amend. Art. CXII (1978).

The Court emphasized that the Governor, like the Legislature, possesses broad discretion to select the means he will use to execute his constitutional duties. The Governor was held to possess "incidental" powers which he may exercise in aid of his primary responsibilities. He may exercise all those powers formally and publicly, as in adopting an executive order, or he may act informally and privately. Further, the Court stressed that the Governor may delegate his incidental authority to others so long as he does not yield to other parties his ultimate responsibility to nominate a judicial candidate and submit that nomination to the Council for confirmation. The Court held that the Governor had in no way exercised legislative powers by formalizing the delegation of one of his ancillary executive functions to a commission by executive order.

Such actions by the Governor the Court viewed as an exercise of an executive power inherent in him as supreme executive magistrate, untainted by any usurpation of the legislative power or any unconstitutional delegation of gubernatorial power.

Separation of Powers Aspects

In general, the Supreme Judicial Court has interpreted the definitive Separation of Powers Article of the Constitution¹ strictly, but not absolutely. No one of the three major branches of the state government — legislative, executive, or judicial — may abandon any of the powers entrusted to it by the Constitution, or transfer those powers to any other party; and one of those branches may not encroach upon the constitutionally reserved powers of another.² However, the Separation of Powers Article does not (a) prevent one branch from authorizing another to act as its agent,³ or (b) bar one branch from assuming those functions which would aid its internal operations without unduly restricting the activity of another coordinate branch.⁴ Gubernatorial actions, whether in the form of executive orders, or otherwise, must respect these constitutional boundaries.

Civil Service Rules Opinion of 1949. In 1949, the Governor and Council sought an advisory opinion of the Supreme Judicial Court as to whether the statute then authorizing the State Civil Service Com-

1. Mass. Const., Part I, Art. XXX (1780).

2. *Opinions of the Justices*, 328 Mass. 674 (1952); *Commonwealth v. Favulli*, 352 Mass. 95 (1967).

3. *Commonwealth v. Favulli*, 352 Mass. 95 (1967).

4. *Opinions of the Justices*, 372 Mass. 883 (1977).

mission to make and amend civil service rules, subject to the approval of the Governor and Council,¹ left room to the Governor and Council to amend a civil service rule, submitted to them by the Commission for approval, by substituting another such rule on the same subject. The Court responded that —

The Governor and Council have no inherent legislative power . . . And no power to enact rules has been delegated to them by the statute. The rule making power in the first instance is vested solely in the commission. The power of the Governor and Council is limited to approval or disapproval of rules or amendments made by the Commission. Therefore the Governor and Council cannot substitute an amendment of their own for an amendment submitted to them by the Commission . . .²

Evidently, this principle applies also to those situations in which the Governor alone exercises a statutory power to approve or disapprove rules and regulations formulated by regulatory agencies of the executive branch.

Impoundment of Funds Opinion of 1978. In an advisory opinion in 1978, the Supreme Judicial Court found no “inherent” power in the Governor, as supreme executive magistrate, to impound funds appropriated by the General Court.³ The Court noted that the Constitution grants to the General Court full power to make laws for the “good and welfare of the Commonwealth, and for the government and ordering thereof.”⁴ Thus, the power to order social priorities and to designate objectives and programs is entrusted to the General Court, which avails itself of appropriation measures as a critical means wherewith to accomplish these ends:

... Once a bill has been duly enacted, however, the Governor is obliged to execute the law as it has emerged from the legislative process. He is not free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law . . .

1. G.L. c. 31, s. 3.

2. *Opinions of the Justices*, 324 Mass. 736, 744 (1949).

3. *Opinions of the Justices*, 375 Mass. 827 (1978).

4. Mass. Const., Part II, c. I, s. I, Art. IV (1780).

... Inasmuch as it is the function of the executive branch to expend funds, it must be implied that the 'supreme executive magistrate' ... is not obliged to spend money foolishly or needlessly. The executive branch is the organ of government charged with the responsibility of, and is normally the only branch capable of, having detailed and contemporaneous knowledge regarding spending decisions. The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, provided he has determined reasonably that such a decision will not compromise the achievement of the underlying legislative purposes and goals...

... A blanket requirement of full expenditure would be invalid because it would not distinguish between situations where, on the one hand, the Governor attempts to substitute his judgement of the merits of a program for that of the Legislature by reducing or eliminating expenditures, and, on the other hand, the Governor makes a reasonable determination that the full legislative purpose can be accomplished by spending less than the legislative forecast or estimate represented by an appropriation...¹

1973 Opinion of Attorney General re Executive Order No. 74

Summary of Executive Order. On July 20, 1970, Governor Francis W. Sargent invoked the authority vested in him "by the Constitution and statutes of the Commonwealth," the provisions of which he did not specify, to issue his "affirmative action" Executive Order No. 74, titled "The Governor's Code of Fair Practice."² The preamble of the executive order proclaimed it "the governing and guiding policy of the Executive Branch of the Government of the Commonwealth" in respect to the enforcement of the state's anti-discrimination laws and the promotion of equal opportunities for all persons regardless of race, color, creed, national origin, military status, sex or age. Article I of the executive order mandated that —

¹*Opinions of the Justices*, 375 Mass. 827, 833-34, 836-34, 836-37 (1978).

²This executive order has since been amended by Executive Orders Nos. 116 and 117 of 1975.

All agencies and appointing authorities of the Commonwealth shall initiate affirmative action programs designed to conform with this policy. All such affirmative action programs shall be subject to review by the Massachusetts Commission Against Discrimination. Any program deemed inadequate by said Commission shall be re-drawn by the Massachusetts Commission Against Discrimination in order to attain positive measures for compliance.

The executive order set forth regulations governing state agency procedures and practices, in furtherance of the above objectives, in relation to (a) state personnel administration,¹ (b) the availability and use of state services and facilities,² (c) the awarding of state contracts,³ (d) state employment referral and placement services⁴ (e) state educational, counseling and training programs,⁵ (f) licensing and regulatory activities of state agencies,⁶ (g) the allocation of state financial assistance,⁷ and (h) state forms.⁸

Reaching beyond the state executive branch itself, Executive Order No. 74 applied its affirmative action policies to state-licensed and state-chartered privately-operated health care facilities⁹ and private educational institutions and schools¹⁰ as a condition of "continued participation" in state programs and of eligibility for state financial assistance. Further, the executive order addressed itself to the activities of local school departments by providing that —

By law, it is the policy of the Commonwealth of Massachusetts to encourage all school committees to adopt as educational objectives the promotion of equal and integrated education and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing of or altering of school attendance lines and the selection of new school sites. The Department of Education

1. Art. II.

2. Art. III.

3. Art. IV.

4. Art. V.

5. Art. VII.

6. Art. X.

7. Art. XIII.

8. Art. XIV.

9. Art. VIII.

10. Art. IX.

shall also pursue a program of promoting fair employment practices for certified teachers and shall periodically examine its publications and educational materials to assure that they are a realistic representation of the world peoples and their contributions to history and culture ...¹

Finally, the executive order authorized and empowered the Massachusetts Commission Against Discrimination to enforce its policies and provisions.² Until 1980, state anti-discrimination statutes, contained no "affirmative action" provision. They authorize the Commission, rather than the Governor, to make, amend and repeal rules and regulations for the "carrying out" of those laws and policies adopted pursuant thereto. These statutes are silent on the subject of gubernatorial executive orders.³

Home Rule Amendment Limitations. Acting pursuant to Executive Order No. 74, the State Department of Education sought to require local school authorities to include affirmative action provisions in all their contracts for state-aided local school construction under the School Building Assistance Act.⁴ The Massachusetts Commission Against Discrimination then requested an advisory opinion from Attorney-General Robert H. Quinn in 1973 as to the legality of such a state requirement.

In that opinion, the Attorney General concluded, in essence, that the inherent authority of the Governor as supreme executive magistrate did not extend to the regulation of municipal government, absent an appropriate enabling statute.⁵ Inasmuch as the Legislature had not acted to impose affirmative action requirements on municipalities, Executive Order No. 74 was, in the judgment of the Attorney General, in conflict with Section 1 of the Home Rule Amendment.

The Attorney-General reasoned that —

The construction of school buildings is a task delegated principally to local municipalities and agencies thereof, with only indirect contact by the Department of Education, whose activity would be under the guidance of the Executive

¹ Art. XII.

² Art. I-VI, IX-XIV.

³ G.L. c. 151B, s. 3(5); c. 151c, s. 5. Acts of 1980, c. 329, s. 54.

⁴ Acts of 1948, c. 645, as amended; Acts of 1965, c. 572, s. 42; Acts of 1971, c. 280; Acts of 1976, c. 302.

⁵ Op. Atty. Gen., November 20, 1973, pp. 86-89.

Order. General Laws, c. 71, s. 68 states that every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children entitled to attend the public schools. The construction and maintenance of schoolhouses seems to fall under the classification of a local matter which the Home Rule amendment... places under the control of the cities and towns, subject only to the standards and requirements of the General Court. The Executive Order appeared without any accompanying legislation binding municipalities and agencies thereof, and, at the present time, the Legislature has not imposed any such affirmative action plan on local authorities.

Although the mandate of c. 71, s. 68 extends to local authorities, the Department of Education has the right to insist upon certain policy and conditions in regard to school construction grants including conditions relating to approval of locally submitted construction plans and financial arrangements, but not extending to the employment practices of the contractors who bid on the work. As such, in that the contract for construction is one between a municipality or agency thereof and a private contractor, and only receives state approval as to certain of its aspects, Article IV of Executive Order #74, entitled "State Contracts," would not be applicable...

...I do not view either the Department of Education's mandate to supervise all of the educational work of the Commonwealth, G.L. c. 69, s. 1, or any action taken pursuant to Executive Order #74 to more equitably utilize qualified minority employees of the Commonwealth in the construction industry, or the Department's control over the disbursement of funds through the School Building Assistance Bureau as lending a sufficient amount of "state action" to a proposed local school construction contract so as to include it under Article IV of the Executive Order.

Subsequent to this 1973 legal ruling, no legislation has been enacted by the General Court on the subject of local government *affirmative action* programs which, in the instance of municipalities, remain a

matter of local home rule discretion. However, all local governments continue fully subject to the *anti-discrimination* statutes.

Other Problems Posed by Executive Order No. 74. Meriting summary reference are two other important aspects of this executive order which neither the Attorney General nor the courts have had occasion to address so far.

Firstly, there is a broad question as to whether the Governor may, by executive order, establish additional requirements above and beyond those ordained by the General Court for the prevention of discrimination, and in the awarding of public contracts to non-state entities.

Clearly, a supreme executive magistrate, the Governor may regulate, in ways not conflicting with the statutes, what practices private entrepreneurs and institutions must follow in executing state contracts. However, it is a large question as to whether their practices in regard to their other activities may be so regulated, absent an enabling act of the General Court. When the General Court has occupied a field in a regulatory way with extensive, detailed legislation, there is an implication of a legislative decision as to the basic rules of the game which are to stand until the General Court decides otherwise as to their scope and life. Use of a gubernatorial executive order to expand the scope of laws applying to the private sector in the name of enforcing those laws fairly raises a charge of an invasion of the reserved legislative powers of the General Court, however well-motivated that executive order is.

Secondly, application of the requirements of Executive Order No. 74 to private schools and educational institutions receiving state aid, or participating in state programs, in respect to their remaining "non-state" activities, poses a problem similar to the Home Rule Amendment objection raised by the Attorney General above.

The Massachusetts Constitution guarantees to Harvard University "forever" all the powers, authorities, rights, liberties, privileges, immunities and franchises of which that institution was possessed in 1780,¹ while reserving to "the Legislature of this Commonwealth" authority to make "alterations in the government of said University."² In 1780, the President and Fellows of Harvard College controlled the personnel and contracting activities of the University subject to the statutes then prevailing.

¹ Mass. Const., Part II, c. V, s. 1, Art. 1 (1780).

² *Ibid.*, Art. III (1780).

The Fourteenth Amendment of the Federal Constitution mandates that "No state shall make or enforce any law which shall. . . deprive any person of life, liberty or property, without due process of law, . . . (or) . . . deny to any person within its jurisdiction the equal protection of the laws."¹ By long-standing Federal case law, corporations other than governmental units are "persons" within the meaning of the Fourteenth Amendment, although not to quite the same full extent as human persons.² While this same exact wording does not appear in the Massachusetts Constitution,³ its principles have been incorporated by judicial case law, which has also ordained that the state constitutional guarantee of equal protection of the laws extends to corporations.⁴ These federal and state constitutional doctrines suggest the existence of a state obligation to treat other private higher educational institutions on an equal footing with Harvard.

If this be true, then the regulation of the activities of private higher educational institutions as to their activities not part of state programs and not aided with state funds may be the exclusive preserve of the General Court, except as it determines in carefully-worded statutes to delegate authority to state regulatory agencies acting as "agents" of the Legislature.

The Governor as the Agent of the Legislature

Under constitutional provisions relating to its general legislative powers,⁵ and to appropriations, the General Court may utilize the Governor as its agent for carrying out programs, policies and objectives established by law. Subject to certain restrictions, the Governor may utilize executive orders in meeting responsibilities so assigned to him.

The Supreme Judicial Court has observed that while the General Court may assign duties to the Governor by law, it may not delegate to him its lawmaking or appropriation powers.⁶ On this score, the Court has emphasized that —

1. U.S. Const., XIV Amend., s. 1 (1868).

2. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U.S. 155 (1877); *Peik v. Chicago & Nw. Ry. Co.*, 94 U.S. 164 (1877); *Chicago, M. & S.P.R. Co. v. Ackley*, 94 U.S. 179 (1877); *Winona & St. Peter R. Co. v. Blake*, 94 U.S. 180 (1877); *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886).

3. Mass. Const., Part I, Art. 1 (1780).

4. *Vigeant v. Postal Telegraph Cable Co.*, 260 Mass. 335 (1927).

5. Mass. Const., Part II, c. 1, s. 1, Art. IV (1780), as amended by Amend. Art. CXII (1978).

6. *Wyeth v. Thomas*, 200 Mass. 474 (1909); *Attleboro Trust Co. v. Commissioner of Corporations and Taxation*, 257 Mass. 43 (1926); *Attorney General v. Brisenden*, 271 Mass. 172 (1930); *Opinions of the Justices*, 286 Mass. 611 (1934), 302 Mass. 605 (1939).

... (The Governor)... has executive powers in the exercise of which the General Court cannot interfere without violating... (the Separation of Powers Article)... but the General Court may, by law, without delegating legislative power, confer other powers of an executive or administrative nature upon the Governor...

The General Court... may by law... confer upon the Governor supervisory powers of an executive or administrative nature over State departments. And we are of the opinion that among the supervisory powers which may be so conferred is the power to determine the particular objects of appropriation in the several State departments... for which shall be expended, in addition to the amounts specifically appropriated therefor, money appropriated — at least if reasonable in amount — to meet “unforeseen conditions” arising in connection with such objects of appropriation generally. Similar principles are applicable to agencies of the Commonwealth other than departments...

The power conferred upon the Governor... does not depend for its validity upon the constitutional provision relating to the issuing of money out of the treasury by “warrant under the hand of the governor... with the advice and consent of the council”...¹

Further, the General Court may delegate to the Governor or other boards and officers the authority to implement the details of policies and programs established by law, so long as specific standards are included in that statute. When the Governor, or such boards or officers, are performing duties so assigned to them by statute, they may employ all ordinary means reasonably necessary for the full exercise of the powers granted to them and for the faithful performance of their assigned tasks, consistent with any limitations imposed by the General Court.²

The Supreme Judicial Court found violative of the Separation of Powers Article a proposed bill amending the State Finance Law³ so as

1. *Opinions of the Justices*, 302 Mass. 605 (1939).

2. *Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare*, 326 Mass. 121 (1950); *Town of Arlington v. Board of Conciliation and Arbitration*, 370 Mass. 769 (1976); *Arno v. Alcoholic Beverages Control Commission*, 1979 Mass. Adv. Sheets, p. 104.

3. G.L. c. 29.

to allow the Governor to make emergency transfers from an emergency reserve line item appropriation to other line item appropriations with the approval of a state commission whose membership included, among others, appointees of the President of the Senate and the Speaker of the House of Representatives. In the Court's opinion, such a commission could be exercising executive and administrative powers. Absent "legislative" members, the judicial objection would vanish, as a procedure for transferring appropriations within statutory guidelines was not viewed judicially as an exercise of legislative power by the executive.¹

In issuing an executive order under a statute, the Governor must be able to point to provisions expressing or implying an adequate delegation of power to him to accomplish his purposes. The failure of the General Court to respond to a Governor's request for a definite enactment cannot be taken as disapproval or a questioning of his executive orders. In the judgment of the Supreme Judicial Court, it is just as compatible, and possibly more so, with legislative approval of, or contentment with, those executive orders. Thus, for example, the affirmative action of the General Court in repeatedly making appropriations that attract federal financial aid contingent upon the state's doing the things specified in a gubernatorial executive order can well be taken as a practical confirmation or ratification of that order by the General Court; such confirmation or ratification can be raised from a course of legislative behavior and need not be set out specifically in the statutes.²

The General Court may confirm, adopt and ratify the acts of a public officer in excess of his authority if the General Court could have granted that authority originally to him. However, the validating statute may not impair vested rights.³

In issuing executive orders under a statute authorizing the same, discretion rests with the Governor to ascertain whether or not a particular matter dealt with in that order falls within the scope of that statute, so long as his exercise of this discretion is an exercise of judgment and not a display of arbitrary power.⁴ Gubernatorial executive orders issued pursuant to a statute continue in force until revoked

1. *Opinions of the Justices*, 302 Mass. 605 (1939).

2. *Director of the Civil Defense Agency and Office of Emergency Preparedness v. Civil Service Commission*, 373 Mass. 401 (1977).

3. *Nichols v. Commissioner of Public Welfare*, 311 Mass. 125 (1942).

4. *Op. Atty. Gen.*, August 18, 1943, pp. 68-70.

by the Governor, or until the statute expires, or when the terms of that statute expressly or by clear implication require that they expire, whichever happens first.¹

Duty of the Governor to Enforce the Laws

Enforcement of State and Federal Laws

The Massachusetts Constitution does not direct the Governor specifically to ensure that the laws of the state are faithfully enforced, as do the constitutions of many other states. The oath of office prescribed by the State Constitution requires him to swear or affirm his "true faith and allegiance" to the Commonwealth, and to pledge his support of that constitution.² The Supreme Judicial Court has ruled that the Governor, as supreme executive magistrate, has a constitutionally-implied prerogative and duty to enforce the laws of the state.³ That duty is also rooted in common law.⁴ Governors have issued executive orders in the fulfilment of their obligations on this score.

The United States Constitution also proclaims its provisions, and all treaties entered into by the United States, to comprise the "supreme Law of the Land," anything in the laws and constitution of any state to the contrary notwithstanding. Further, the executive, legislative and judicial officers of the states are bound by oath or affirmation to support the Federal Constitution.⁵

While it is the duty of federal officials, rather than state authorities, to enforce federal laws, state and local officials must comply with those federal laws where applicable to themselves and their official responsibilities and activities. The Governor, as supreme executive magistrate, has utilized executive order as a means of directing state administrative agencies in their participation in programs financed in whole or in part by federal subventions, and in their compliance with applicable federal laws, rules and regulations, including presidential executive orders.

Gubernatorial Executive Orders and Federal Aid Funds

At times, the Governor and General Court have had to distinguish their respective jurisdictional concerns in respect to federal programs

¹ Op. Atty. Gen., September 27, 1966, pp. 78-80.
² Mass. Const., Amend. Arts. VI (1821) and VII (1821).
³ *Opinions of the Justices*, 375 Mass. 827 (1978).
⁴ Mass. Const., Part II, c. VI, Art. VI (1780).
⁵ U.S. Const., Art. VI (1787).

and funds. In an advisory opinion in 1978, the Supreme Judicial Court held that —

If Federal funds are received by State officers or agencies subject to the condition that they be used only for objects specified by federal statutes or regulations, the money is impressed with a trust and is not subject to appropriations by the Legislature. . . The recipient of such funds has no choice but to comply with the requirements imposed by Federal law. . .

Moreover, legislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and expended only by an appropriation by the legislative branch, would result in the Legislature's interfering with the right and obligations of the executive branch to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws. . .

To be sure, not all Federal money is received in trust. Federal reimbursements may be made to the State without conditions imposed as to expenditure. This money would be subject to the legislative power of appropriation. . .¹

On the other hand, federal statutes do not allow the Governor and other administrative authorities of the state to take liberties with the state constitution and statutes.

In one of its two recent decisions pertaining to the fiscal controversies between the Massachusetts Bay Transportation Authority (MBTA) and its Advisory Board, the Supreme Judicial Court ruled that the authority granted by the General Court to the MBTA to enter into federal aid agreements² did not empower the MBTA to commit itself to expenditures exceeding the annual budget approved for it by the MBTA Advisory Board in conformance with state law.³ This would be so even though the MBTA statute stated "the provisions of any federal law, administrative regulation or practice governing federal assistance. . . (for the purposes of that state law). . . shall, to the extent necessary to enable the commonwealth or its subdivision to receive

1. *Opinions of the Justices*, 375 Mass. 851 (1978).

2. G.L. c. 161A, s. 29.

3. *Ibid.*, s. 5(i).

such assistance and not constitutionally prohibited, override any incumbent provision of . . . (the MBTA statute). . .” Hence, a gubernatorial executive order purporting to allow the MBTA to exceed its Advisory Board-approved budget was invalid.¹

Suspension of Laws by Gubernatorial Executive Order

Constitutional Provision

Article XX of the Declaration of Rights (Part I) of the State Constitution provides that “the power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislative shall expressly provide for.”

The Supreme Judicial Court has ruled that the term “particular cases” means particular laws, and not particular individuals, or matters within a class governed by a given statute.² Moreover, the Court has held that a law may not be suspended, under this constitutional provision, for the benefit of single named individual.³ In general, a statute authorizing the Governor to suspend a law, whether by proclamation, executive order or otherwise, must be reasonably precise as to which law or laws he is permitted to suspend.⁴

Roving Commission Prohibition

Further to that last point, the Supreme Judicial Court enunciated in 1944 its “roving commission” warning that —

... (The) . . . Legislature cannot constitutionally grant to the Governor a roving commission to repeal or amend by executive order unspecified provisions included anywhere in the entire body of the statute law of the Commonwealth and in all the rules, regulations, ordinances and by-laws in force throughout the jurisdiction, with no other qualification or direction than that his exercise of this power by “necessary” or even no more than “expedient” for meeting “the supreme emergency” of war — a limitation so elastic that it is impos-

¹ *Massachusetts Bay Transportation Authority Advisory Board v. Massachusetts Bay Transportation Authority*, 1981 Mass. Adv. Sheets, p. 403.

² *Opinions of the Justices*, 286 Mass. 611 (1934); *Commissioner of Public Health v. Bessie M. Burke Memorial Hospital*, 366 Mass. 734 (1975).

³ *Holden v. James*, 11 Mass. 396 (1814); *Dickinson v. New England Power Co.*, 257 Mass. 108 (1926).

⁴ *Opinions of the Justices*, 315 Mass. 761 (1944).

sible to imagine what might be done within its extent and almost every field of administration and jurisprudence. It is one thing for the Legislature to pass enabling acts under which large discretion may be given to executive or administrative officers to be exercised within defined fields for defined ends. It is quite another thing for the Legislature to grant to the executive without specification or definition of means or ends all the powers which it could grant by any specific enactment in all fields which may be affected by a factor so all pervasive as war. The first is a proper exercise of the legislative function. The second is a surrender of the legislative function to the executive...¹

MBTA Cases of 1979-81

In 1979, and again in 1980, the Boston metropolitan area faced a shutdown of its regional public mass transportation services because of the failure of the Massachusetts Bay Transportation Authority (MBTA) to hold its spending within the annual budgets voted for it by the MBTA Advisory Board composed of representatives of the 79 cities and towns. MBTA annual debt service and operating costs, minus operating revenues, federal and state aid, and other receipts, are assessed on the 79 municipalities each year according to statutory formulas.

On December 18, 1979, Governor Edward J. King issued Executive Order No. 172 placing the MBTA under direct gubernatorial control, designating the MBTA Board of Directors as his agent to manage the transit system, and authorizing the Authority to exceed its fiscal 1979 budget approved by the MBTA Advisory Board (\$285.3 million) by not more than \$12.1 million. On November 18, 1980, the Governor issued a substantially similar Executive Order No. 189 designating Secretary of Transportation and Construction Barry M. Locke and the Board of Directors of the MBTA to manage the Authority, and authorizing the MBTA to exceed by not more than \$41 million the fiscal 1980 budgets of \$302.1 million approved by the MBTA Advisory Board. In each executive order the Governor cited as the legal basis for the orders "...the authority vested in me as Supreme Executive Magistrate under the Massachusetts Constitution, General Laws Chapter

1. *Opinions of the Justices*, 315 Mass. 761, 767-68 (1944).

161A, Section 20, Chapter 639 of the Acts of 1950 as amended and any other powers vested in me under the Constitution of the Commonwealth, or otherwise."

Of the two statutes cited, the first, in the MBTA organic law, provided in part that—

Notwithstanding any contrary provision of law, whenever there exists a continued interruption, stoppage or slowdown of transportation of passengers on any vehicle or line of the authority... and which threatens the availability of essential services of transportation to such an extent as to endanger the health, safety or welfare of the community, the governor may declare that an emergency exists. During such emergency he may take possession of, and operate in whole or in part, the lines and facilities of the authority in order to safeguard the public health, safety and welfare...¹

The second cited statute, the Civil Defense Act, permits the Governor to exercise extraordinary powers, through the issuance of executive orders, during actual emergencies, or threatening occurrences, of (a) enemy attack, sabotage or other hostile action, (b) riots or civil disturbances, (c) natural disasters, (d) drought disasters, and (e) nuclear or radiation accidents.²

In its opinion on Executive Order No. 189, rendered in brief on November 28, 1980 and fully in early February of 1981, the Supreme Judicial Court found that the statutes cited by the Governor did not expressly authorize him to suspend or set aside the statutory authority of the MBTA Advisory Board, or take over the operation of the Authority, in the circumstances then prevailing. A cessation of operations of the transit system caused by a budgetary dispute between the MBTA Advisory Board, the MBTA and the Governor was not a stoppage in violation of a court order; and such an event was not encompassed within the specific grounds afforded by the Civil Defense Act for suspending statutes. Consequently, the Court concluded that the Governor had exceeded his authority as supreme executive magistrate, in violation of Article XX of the Declaration of Rights.³

Remedial legislation passed in the special session of the General

¹ G.L. c. 161A, s. 20.

² Acts of 1950, c. 639, ss. 5, 8 and 8A, as amended.

³ *Massachusetts Bay Transportation Authority Advisory Board v. Massachusetts Bay Transportation Authority*, 1981 Mass. Adv. Sheets, p. 403.

Court in December of 1980 provided for a state and local sharing of MBTA cost overruns occasioned by Executive Order No. 189, and altered aspects of the organization of the MBTA and its Advisory Board.¹

Shortly after its pronouncement in regard to Executive Order No. 189, the Court rendered a substantially similar negative verdict as to Executive Order No. 172,² but concluded that the \$12.1 million cost overrun had been covered in the state share of MBTA costs financed by the 1980 state general appropriation act.³

Executive Reorganization Powers of Governor

In some other states, "reorganization plans" submitted by the Governor to the state legislative under constitutional or statutory procedures whereunder such plans become law if not vetoed by the legislature, are regarded as forms of executive orders.

On this score, Amendment Article LXXXVII of the Massachusetts Constitution, ratified in 1966, provides in part as follows:

Section 1. For the purpose of transferring, abolishing, consolidating or co-ordinating the whole or any part of any agency, or the functions thereof, within the executive department of the government of the commonwealth, or for the purpose of authorizing any officer of any agency within the executive department of the government of the commonwealth to delegate any of his functions, the governor may prepare one or more reorganization plans, each bearing an identifying number and may present such plan or plans to the general court, together with a message in explanation thereof.

Section 2. (a) Every such reorganization plan shall be referred to an appropriate committee, to be determined by the Clerks of the Senate and the House of Representatives, with the approval of the President and Speaker, which committee shall not later than thirty days after the date of the Governor's presentation of said plan hold a public hearing thereon and shall not later than ten days after such hearing report that it approves or disapproves such plan and such

1. Acts of 1980, c. 581.

2. *Massachusetts Bay Transportation Authority Advisory Board v. The Governor*, 1981 Mass. Adv. Sheets, ¶

3. Acts of 1980, c. 329, s. 2, Line item 6005-0011.

reorganization plan shall have the force of law upon expiration of the sixty calendar days next following its presentation by the governor to the general court, unless disapproved by a majority vote of the members of either of the two branches of the general court present and voting, the general court not having been prorogued within such sixty days.

(b) After its presentation by the governor to the general court, no such reorganization plan shall be subject to amendment by the general court before expiration of such sixty days.

(c) Any such reorganization plan may provide for its taking effect on any date after expiration of such sixty days and every such reorganization plan shall comply with such conditions as the general court may from time to time prescribe by statute regarding the civil service status, seniority, retirement and other rights of any employee to be affected by such plan.

Little use has been made of this constitutional provision so far, as Governors have preferred to achieve the reorganization of statutory agencies of the executive branch by means of statutes. Gubernatorial executive orders have been employed to create advisory boards and commissions. And individual state agencies, on their own initiative or at the Governor's direction, have restructured their non-statutory component units from time to time.

In general, reorganization plans submitted under the above-cited constitutional article have not been regarded as "executive orders" in this state, so much as a form of "negative" legislation.

War Powers of the Governor

State Constitutional Provisions

The general legislative power conferred on the General Court by the Constitution includes specific authority to legislate in relation to (a) "the defense of the government" of the state,¹ (b) the "several duties, powers, and limits" of military officers of the state,² and (c) the

1. Mass. Const., Part II, c. 1, s. 1, Art. IV (1780), as amended by Amend. Art. CXII (1978).

2. *Ibid.*

“recruitment, equipment, organization, training and discipline” of the state’s armed forces.¹

The Governor, as commander-in-chief, has the power —

...to assemble the whole or any part of them for training, instruction or parade, and to employ them for the suppression of rebellion, the repelling of invasion, and the enforcement of the laws. He may, as authorized by the general court, prescribe from time to time the organization of the military and naval forces and make regulations for their government ...²

All military and naval officers shall be selected and appointed and may be removed in such manner as the general court may by law prescribe, but no such officer shall be appointed unless he shall have passed an examination prepared by a competent commission or shall have served one year in either the federal or state militia or in military service. All such officers who are entitled by law to receive commissions shall be commissioned by the governor.³

All...superintending officers of public magazines and stores, belonging to this commonwealth, and all commanding officers of forts and garrisons within the same, shall once in every three months, officially, and without requisition, and at other times, when required by the governor, deliver to him an account of all goods, stores, provisions, ammunition, cannon with their appendages, and small arms with their accoutrements, and of all other public property whatever under their care respectively; distinguishing the quantity, number, quality and kind of each, as particularly as may be; together with the condition of such forts and garrisons and the said commanding officer shall exhibit to the governor, when required by him, true and exact plans of such forts, and of the land and sea or harbor or harbors adjacent...⁴

1. Mass. Const., Part II, c. II, s. I, Art. VII (1780), as amended by Amend. Art. LIV (1918).

2. *Ibid.*

3. Mass. Const., Part II, c. II, s. I, Art. X (1780), as amended by Amend. Art. LIII (1918).

4. Mass. Const., Part II, c. II, s. I, Art. XII (1780), as amended by Amend. Art. LIII (1918).

Any exercise of these war powers by the Governor must respect safeguards imposed by the Declaration of Rights in the State Constitution relative to the quartering of soldiers in private homes¹ and to martial law.²

Hence, any executive orders issued by the Governor in his role as commander-in-chief must conform to all controlling statutes enacted by the General Court, and the Declaration of Rights.

Continuity of Government. Amendment Article LXXXIII, added to the State Constitution in 1964, provides that the General Court shall have —

...full power and authority to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices in periods of emergency resulting from disaster caused by enemy attack, and to adopt such other measures as may be necessary and proper for insuring continuity of the government of the commonwealth and the governments of its political subdivisions:

In 1962, prior to the ratification of this constitutional amendment, the General Court added continuity of government provisions to the Civil Defense Act dealing only with the continuity of management in state administrative departments and agencies, and replacements in offices whose incumbents are named by the Governor with or without Council approval.³ The General Court has yet to provide for the continuity of government in the Council itself, in the legislative branch of the state government, or in local government.

To date, the courts have had no occasion to ascertain whether Amendment Article LXXXIII admits of any erosion of the principles enunciated by the Separation of Powers Article and, if so, how far.

Federal Constitutional Provisions

Finally, the Federal Constitution requires the Federal Government to guarantee to every state "a republican form of government" and

¹ Mass. Const., Part I, Art. XXVII (1780).

² Mass. Const., Part I, Art. XXVIII (1780).

³ Acts of 1950, c. 639, ss. 20A-20C (added by Acts of 1962, c. 767).

protection against invasion; and on the application of the legislature of a state, or of its Governor when the legislature cannot be convened, the federal government must assist in the suppression of domestic violence within that state.¹ The ultimate authority for determining what constitutes a "republican form of government," from the federal government's viewpoint, and what means are proper for the suppression of domestic violence in a state requesting federal assistance, rests with Congress.²

Attorney General's Advisory Opinions of 1943

In 1943, Attorney General Robert T. Bushnell rendered two requested advisory opinions to Governor Leverett Saltonstall in relation to the latter's authority to issue executive orders under the War Powers Acts of 1941 (c. 719) and 1942 (c.13), as amended. These statutes empowered the Governor to cooperate with federal authorities and other states "in matters pertaining to the common defense or to the common welfare," and to take any measures he deemed "proper to carry into affect" federally-requested actions for the "national defense" and the "public safety." In detailed terms, these emergency statutes authorized the Governor to suspend described laws, and to take other measures in the furtherance of these objectives.

In construing the Governor's authority as supreme executive magistrate and commander-in-chief under the foregoing War Powers Acts, the Attorney-General emphasized that —

While the Supreme Judicial Court of Massachusetts has not had occasion to pass upon or define the extent or limit of the authority conferred upon the Governor by the foregoing statutes, it is clear from their express purpose and from their context that the Legislature intended to confer broad power upon the Governor to deal with matters affecting the common defense and the common welfare and arising out of the present emergency.

The rapidly changing conditions resulting from the prosecution of a total war render it practically impossible for the Legislature to prescribe a formula by which it could determine in advance whether a given matter pertains to the

1. U.S. Const., Art. IV, s. 4.

2. *Luther v. Borden*, 48 U.S. 1 (1849); *Texas v. White*, 74 U.S. 700 (1869).

common defense or the common welfare, or is necessary for the support of the National Government in the prosecution of the war. The determination as to whether a particular matter does in fact so pertain or is in fact necessary to support the National Government within the scope of the statutes referred to above has been left by the Legislature to the sound discretion of the Governor...

...The...discretion as to whether a particular matter pertains to the "common defense or to the common welfare" or is "needed for the support of the national government in the prosecution of the war," as those phrases have been used by the Legislature in the foregoing statutes, appears to be lodged with the Governor so long as that discretion is an exercise of judgment and not a display of arbitrary power...

In another advisory opinion in 1943, the Attorney General expressed the view that the Governor could not issue executive orders under the War Powers Acts, providing for state enforcement and prosecution of federal price regulations in Massachusetts.²

Rulings of Supreme Judicial Court

In general, the Supreme Judicial Court has interpreted the war powers of the Governor flexibly, but conservatively, stressing (a) that exercise of those powers must be based on statute in most cases, and (b) that gubernatorial actions thereunder must be consistent with the provisions and legislative intent of such laws.

Advisory Opinion of 1944. This advisory opinion to the Governor and Council involved the validity of an executive order, proposed for issuance under the War Powers Acts, which would have changed the date for the state primary elections of 1944. In holding such actions unconstitutional because the War Powers Acts contained no specific grant of authority to the Governor to change election dates, the Court ruled that —

We are not dealing here with the constitutional powers of the Commander-in-Chief of the military and naval forces of the Commonwealth in an area of hostilities or with the scope of executive powers in general in time of war. We are dealing

1. Op. Atty. Gen., August 18, 1943, pp. 68-70

2. Op. Atty. Gen., May 26, 1943, pp. 53-55.

only with an attempt to add to those powers still other powers by legislative delegation. War does not abrogate the Constitution. It supplies no excuse for confusing legislative powers with executive powers. . . .¹

In addition, the Court warned that manipulation of election dates could lead to an infringement of constitutional requirements that elections be "certain and regular."² In a subsequent case involving the Civil Defense Act of 1950,³ which replaced the War Powers Acts of World War II vintage, the Court stressed that such laws must be construed, if possible, in such a way as to avoid grave constitutional doubts.⁴

Civil Defense Agency Case of 1977. The Civil Defense Act of 1950 provided (a) that employees of the Civil Defense Agency were not to be subject to the State Civil Service Law⁵ and rules,⁶ and (b) that the Governor be empowered to apply for federal grants and to accept the same subject to relevant requirement imposed by the federal government.⁷ One condition of such federal aid for civil defense purposes was that personnel of the state and local civil defense agencies be placed under a merit system. To qualify for that aid, the governor issued executive orders in the early 1960's placing civil defense personnel (except the Director of the Civil Defense Agency) under the State Civil Service Law.⁸ The General Court never formally ratified these executive orders, but it did enact legislation subsequently in 1963 making 105 positions in the State Civil Defense Agency "permanent."⁹ When the State General Appropriation Act for Fiscal 1976 provided for a reduction in force of 30 positions in the Civil Defense Agency¹⁰ for economy reasons, litigation followed.

In its resulting decision, the Supreme Judicial Court held that the Governor had properly exercised "inherent" authority available to him in the Civil Defense Act to obtain federal aid under its provisions, and that he had complied with a "clear" legislative intent on that score:

1. *Opinions of the Justices*, 315 Mass. 761 (1944).

2. Mass. Const., Part 1, Art. VIII (1780).

3. Acts of 1950, c. 639, as amended.

4. *Worcester County National Bank v. Commissioner of Banks*, 340 Mass. 695, 701 (1960).

5. G.L. c. 31.

6. Acts of 1950, c. 639, s. 2.

7. *Ibid.*, s. 15.

8. Executive Order No. 36 (1960); amended by Executive Orders Nos. 38 (1961), 39 (1961), 41 (1961), 42 (1961) and 42A (1962).

9. Acts of 1963, c. 807.

10. Acts of 1975, c. 684, s. 2; Item 04320-0001; s. 7.

Under the circumstances, the Court found that his use of executive orders to supersede one provision of the Civil Defense Act to comply with the intent of another provision of that law was not so extraordinary as to bring his powers into serious question. The Legislature's action of 1963 was seen as confirming the executive orders, by clear implication.¹

The Court described the situation as being comparable to one which would raise little difficulty, such as a statute authorizing an administrator to determine whether or not to invoke an otherwise dormant law, or to render inoperative an otherwise active statutory provision. Such action is valid if the Governor can point to a statute expressing or implying from its legislative history an adequate delegation of power to accomplish his purpose.

CHAPTER V. STATUTORY BASES OF GUBERNATORIAL EXECUTIVE ORDERS IN MASSACHUSETTS

Statutory Bases Generally

The Massachusetts statutory provisions authorizing the Governor to issue proclamations on ceremonial occasions (77) far outnumber those which make specific reference to his issuance of proclamations and executive orders having the force of law (6). Two other statutes dealing with gubernatorial executive orders include one such law validating a particular executive order, and a second law requiring executive orders to be filed with the State Secretary for publication in the Massachusetts Register.

The statutes specifically authorizing the Governor to issue proclamations and executive orders having the force of law permit him to do so only in relation to emergencies arising from (a) war, sabotage and other hostile activity, (b) civil disorders, (c) natural disasters, (d) water shortages, (e) nuclear accidents, (f) fires, and (g) certain industrial disputes which threaten the public health and safety. Implied authority to issue proclamations and executive orders is found in certain other laws vesting emergency powers in him in respect to the latter private sector industrial disputes, and to interruption of the public mass transportation services of the Massachusetts Bay Transportation Authority.

1. *Director of the Civil Defense Agency and Office of Emergency Preparedness v. Civil Service Commission*, 373 Mass. 401 (1977).

Except as to the foregoing major emergency situations, the General Court has been reluctant to empower the governor to issue proclamations and executive orders regulating the persons, property and procedural rights of the general public or any segment thereof, outside the executive branch of the state government itself. Instead, the General Court has preferred to rely on delegations of regulatory authority to state administrative agencies and quasi-judicial agencies to implement policies and programs ordained by statute. That authority is wielded within the framework of procedural and other safeguards mandated by the State Administrative Procedure Act¹ and other controlling laws.

Ceremonial Proclamations and Executive Orders

Under 76 statutes,² the Governor is directed to issue proclamations annually honoring 86 ceremonial occasions which are listed in Appendix D of this report. In addition, he may issue proclamations on occasions of national rejoicing or mourning, under another statute.³ These 88 ceremonial incidents include 35 historical anniversaries, and 30 days, and 23 weeks or months, honoring particular groups, events, social objectives and other causes. Of the state's 13 legal holidays, all are included within the enumeration of days for which such proclamations must be missed, except for New Year's Day, Labor Day, Thanksgiving Day and Christmas.⁴

In most instances, the statutes requiring these ceremonial proclamations simply direct the Governor to issue the proclamation on the date, or within the time period, designated for the particular occasion. In a few instances, such as the laws relating to Student Government Day,⁵ United Nations Day⁶ and Traffic Safety Week,⁷ more extended duties are imposed on the Governor and other officials in relation to the way in which the occasion is to be honored.

Traditionally, governors have issued regularly a proclamation honoring Thanksgiving Day, a legal holiday, even though not specifically required by law to do so. From time to time, other nonstatutory

1. G.L. c. 30A.

2. G.L. c. 4, s. 7(18A); c. 6, ss. 12A-15PP.

3. The 13 Massachusetts legal holidays include: New Year's Day, Martin Luther King's Birthday, Washington's Birthday, Evacuation Day (Suffolk County only), Patriot's Day, Memorial Day, Bunker Hill Day (Suffolk County only), Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas. (G.L. c.4, s. 7.)

4. G.L. c. 6, s. 12M.

5. G.L. c. 6, s. 12N.

6. G.L. c. 6, s. 15P.

proclamations of a ceremonial character have been issued on special occasions deemed worthy by individual governors, in the exercise of their functions as supreme executive magistrate and ceremonial head of state.

Early War Powers Acts of 1917-45

Shortly after America's entry into World War I, Massachusetts became the first state to grant emergency war powers to its governor. The War Powers Act of 1917¹ enumerated the powers so granted to the Governor, his exercise of which required the consent of the Council. With the approval of that body, the Governor could delegate those powers to other governmental officials.² Among these was the power to suspend certain named statutes. Provision was made for judicial review of actions taken by the Governor and other public officials under the act.

The Governor was authorized to issue "regulations" and "proclamations," subject to Council approval where required, to carry out the provisions of the War Powers Act, which expired at the war's end.³ The term "executive order" was not used to describe these documents.

Lengthier, more detailed statutes conferred similar but greatly expanded emergency powers on the Governor during World War II.⁴ Particular provisions of these laws became operative upon issuance of executive orders and proclamations by the Governor. In addition, the Governor was empowered to —

... exercise any power, authority or discretion conferred on him by any provision of. . . (Acts of 1941, c. 719 and Acts of 1942, c. 13). . . by the issuance or promulgation of *executive orders* or general regulations, or through such department or agency of the commonwealth or of any political subdivision thereof, or such person, as he may direct by a writing signed by him and filed in the office of the state secretary. Any department, agency or person so directed shall act in conformity with any regulations prescribed by the governor for its or his conduct.

1. Acts of 1917, c. 342.

2. *Ibid.*, s. 12.

3. *Ibid.*, ss. 2, 3 and 25.

4. Acts of 1941, c. 719, as amended by Acts of 1943, c. 3; Acts of 1942, cc. 13 and 18; Acts of 1945, c. 155

Whoever violates any provision of any such executive order or general regulation issued or promulgated by the governor, for the violation of which no other penalty is provided by law, shall be punished by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both.

Any provision of any general or special law, or of any rule, regulation, ordinance or by-law, to the extent that such provision is inconsistent with any order or regulation issued or promulgated under this act, shall be inoperative while such order or such last mentioned regulation is in effect; provided, that nothing in this section shall be deemed to affect or prohibit any prosecution for a violation of any such provision before it became inoperative...²

A total of 99 gubernatorial executive orders were issued under these World War II statutes before their expiration in 1949. Those temporary laws became the model, in part, for the present Civil Defense Act of 1950.

Civil Defense Act of 1950 and Related Statutes

Civil Defense Act of 1950

The most sweeping statutory authority to issue executive orders in now afforded to the Governor in the Civil Defense Act of 1950,³ a much-amended general law which has not been incorporated into the Massachusetts General Laws as yet. Within the four corners of the Civil Defense Act, the Governor may issue executive orders having the force of law to meet the emergencies embraced by it, and to implement its stated purposes and policies.

Synopsis of Civil Defense Act. The provisions of the Civil Defense Act are summarized as follows:

Section 1. Definitions. Herein various words and phrases used in the Civil Defense Act are defined.

1. Acts of 1942, c. 13, s. 3.

2. *Ibid.*, s. 4.

3. Acts of 1950, c. 639, as amended by Acts of: 1951, cc. 434, 460, 531 and 547; 1951, c. 580, ss. 1-2; 1952, c. 269; 1953, c. 500, s. 1; 1953, cc. 532 and 491; 1955, cc. 25, and 607, ss. 1-2; 1956, c. 401, s. 1; 1956, c. 560, ss. 1-2; 1957, c. 684; 1958, c. 180; 1958, c. 425, s. 1; 1962, cc. 350 and 767; 1962, c. 743, s. 1; 1964 c. 740, ss. 3-4 (initiative law); 1968, c. 579, ss. 1-5; 1970, c. 112; 1978, c. 478, s. 16; and 1979, c. 796, s. 26.

Section 2. State Civil Defense Agency. A "Civil Defense Agency and Office of Emergency Preparedness," headed by a Director appointed by the Governor, is established within the executive branch of the state government. Its organizational aspects, and duties of the Director, are regulated.

Section 2A. Fall-out Shelters. The Director of Civil Defense is authorized to establish standards for fall-out shelters, to be enforced by local building inspectors. These standards supersede conflicting requirements of local building codes, but only as permitted by detailed aspects of this section.

Section 2B. Nuclear Power Plants. The Director of Civil Defense is ordered to designate as "nuclear power plant areas" regions of the state which are within 10-mile radius of any such power plant, and to develop certain plans to deal with nuclear accidents.

Section 3. Civil Defense Advisory Council. This Inter-agency Council is created and the Governor is authorized to designate its chairman and to determine its membership, advisory role and powers.

Section 4. General Powers and Duties of Governor. The Governor is given "general direction and control" of the Civil Defense Agency. This section details certain of his responsibilities, powers and duties on that score.

Section 5. Gubernatorial Proclamations of State of Emergency. The opening paragraph of this lengthy section authorizes the Governor to proclaim a state of emergency in the following situations, and on the following grounds:

Because of the existing possibility of the occurrence of disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action in order to insure that the preparations of the commonwealth will be adequate to deal with such disasters, and generally to provide for the common defense and to protect the public peace, health, security and safety, and to preserve the lives and property of the people of the commonwealth, if and when the congress of the United States shall declare war, or if and

when the President of the United States shall by proclamation or otherwise inform the governor that the peace and security of the commonwealth are endangered by belligerent acts of any enemy of the United States or of the commonwealth or by the imminent threat thereof; or upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or from riot or other civil disturbance; or from fire, flood, earthquake or other natural causes; or whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food; or whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the commonwealth, the governor may issue a proclamation or proclamations setting forth a state of emergency.

The section then details the emergency powers the Governor may invoke under such a proclamation, with reference to (a) the use of the personnel and property of state agencies, (b) the use of real and personal property whether privately or publicly owned, (c) the compensation of owners of private property so used, and (d) emergency uses of the eminent domain power.

Section 6. Cooperation With Other States and the Federal Government. The Governor is authorized to cooperate with these authorities for the purposes of this act, and to take any measures he deems "proper to carry into effect any request of the President of the United States... (relative to)... the national defense or the public safety."

Section 7. Additional Powers of Governor. This long section authorizes the Governor, during a state of emergency, to exercise detailed enumerated powers in respect to (1) the protection of persons and property, (2) explosives, (3) institutional inmates, (4) public utilities, (5) communications, (6) transportation, pedestrian travel and vehicles, (7) financial institutions, (8) hours of business and employ-

ment, (9) vocational and educational institutions, (10) assemblies and parades, (11) birds, animals, articles and objects useful to hostile elements, (12) licenses, permits, and registration certificates, (13) funds and property furnished by the federal government to the state or its political subdivisions, (14) contracts and purchasing activities of the state or its political subdivisions, (15) public records, and (16) food and household supplies.

Finally, this section authorizes the Governor to suspend "the operation of any statute, rule or regulation which affects the employment of persons within the commonwealth when, and at such times as such suspension becomes necessary in the opinion of the governor to remove any interference, delay or obstruction in connection with the production, processing or transportation of materials which are related to the prosecution of war or which are necessary because of the existence of a state of emergency."

Section 8. Gubernatorial Executive Orders. Under this section of the Civil Defense Act, *the Governor may exercise any power, authority or discretion conferred on him by any provision of this act*, either under an actual proclamation of a state of emergency as provided in Section 5 or in reasonable anticipation thereof and preparation therefor, *by the issuance or promulgation of executive orders or general regulations*, or by instructions to such person or such department or agency of the commonwealth, including the civil defense agency, or of any political subdivision thereof, as he may direct by a writing signed by the Governor and filed in the office of the State Secretary. Any department, agency or person so directed shall act in conformity with any regulations prescribed by the Governor for its or his conduct.

Whoever violates any provision of any such *executive order or general regulation issued or promulgated by the Governor*, for the violation of which no other penalty is provided by law, shall be punished by imprisonment for not more than one year, or by a fine of not more than \$500, or both.

Section 8A. Inconsistent Provisions of State and Local Laws and Regulations. Any provision of any general or special law or of any rule, regulation, ordinance or by-law to the extent that such provision is inconsistent with any order or regulation issued or promulgated under this act shall be inoperative while such order or such last-mentioned regulation is in effect; provided that nothing in this section shall be deemed to affect or prohibit any prosecution for a violation of any such provision before it became inoperative.

Section 9. Emergency Power of Director of Civil Service. This section was repealed by Acts of 1962, c. 743, s. 1.

Section 10. Blackout and Air Raid Regulations. The general authority of state and local police and firefighting personnel, and of the state and federal armed forces, to enforce such regulations is defined. In connection therewith, the Governor may issue "written orders" for such enforcement purposes, allowing entry onto private property.

Section 11. Fire and Police Protection. Herein are elaborated the power and duties of cities and towns, and of their civil defense agencies, police and fire departments, in relation to civil defense emergencies. The status of auxiliary police and firefighting personnel is regulated. State reimbursement to cities and towns is authorized for purposes specified by this section.

Section 11A-11B. Civil Defense Claims Board. The powers, duties and functions of this state board, consisting of the Chairman of the Industrial Accident Board and the Secretary of Administration and Finance, or their designees, and an Assistant Attorney General named by the Attorney General, are spelled out. Its responsibilities relate to the indemnification of civil defense personnel and their survivors for injuries to, or death suffered by, such personnel while performing their duties.

Section 12. Civil Liability of State and Its Political Subdivisions. That liability for death, personal injuries, and property damage arising from activities of state and local

agencies and their employees during civil defense emergencies is restricted drastically.

Section 12A. Civil Liability re Use Of Realty for Shelter. Persons granting, to a city or town, permission to use their private property for shelter purposes during civil defense emergencies are exempted from civil liability for injuries, death, and property losses arising from such use of that property.

Section 13. Local Civil Defense Agencies. Local governments are required to organize such agencies in the manner and form set forth in this section. Certain powers of local governments in respect to civil defense are defined.

Section 14. Local Mutual Aid. Intercommunity mutual aid arrangements for civil defense and disaster purposes are authorized *per* the requirements of this section and the state's civil defense plan.

Section 15-15B. Local Financing. Political subdivisions are authorized to appropriate money, to levy taxes and incur debt for the financing of their civil defense activities, and to accept federal aid therefor. The Governor is authorized to accept federal aid for local civil defense purposes, subject to the applicable terms, rules and regulations of the federal government.

Section 15C. Water Supply. Local governments are authorized to enter into contracts for the interconnection of water distribution systems and for the use of pumping equipment. Other aspects of water supply are regulated.

Section 16. Use of Existing State and Local Government Facilities. This section defines the authority of the Governor, and of state and local government agencies acting under his control, to make maximum use of the services, facilities and personnel of such agencies in carrying out the provisions of this statute.

Section 16A. Court Sessions During State of Emergency. Operation of the state courts during a state of emergency are

regulated under this section. Special powers are granted to the judiciary in connection therewith.

Section 17. "Hatch Act" Rule. State and local civil defense organizations may not be employed, or engage, in political activities either directly or indirectly.

Section 18. Loyalty Oaths. This section prescribes an oath of office for civil defense personnel, and prohibits the employment or use by state and local civil defense agencies of subversives.

Section 19. Severability. If any provision of this act, or the application thereof to any person or circumstances, is held invalid, other provisions of this act remain valid. Provisions of this act are declared to be severable.

Section 20. Cooperation of Governmental Agencies. State and local government agencies and their officers and employees are required to cooperate with the Governor and the State Director of Civil Defense in all matters affecting civil defense. *The Governor is authorized to make, amend and rescind orders, rules and regulations pertaining to civil defense, which may not be contravened by rules and regulations of state agencies or of political subdivisions.*

Section 20A. Temporary Successors to State Agency Heads. The head of each state department and division must designate five subordinates to act for him, in the event of his absence or disability. Such designations are subject to gubernatorial approval, with Council consent where required.

Section 20B-20C. Offices Whose Incumbents Are Appointed by the Governor With the Advice and Consent of the Council. These sections permit the Governor to fill temporarily, until the Council can meet, any such office which falls vacant due to enemy attack. Where incumbents of a given office may be removed permanently only with Council approval, the Governor may remove such an officer, pending the meeting of the Council. The foregoing actions by the

Governor are operative only so long as enemy attack prevents a quorum of the Council from assembly.

Section 21. State Civil Defense Agency Expenditures. That agency is authorized to expend such sums as are appropriated for the purpose of carrying out the provisions of this act.

Section 22. Termination of Act. This act or any part thereof "shall become inoperative by the adoption of a joint resolution to that effect" by the two branches of the General Court acting concurrently.

From time to time, additional responsibilities have been assigned by temporary emergency statutes to the State Civil Defense Agency in respect to particular natural disorders, such as the Worcester Tornado of 1953,¹ the 1955 Flood Disaster,² and the Forest Fire Disaster of 1957.³ These duties were mostly of a fiscal or administrative character, imposed in the wake of those disasters.

Emergency Finance Act of 1951

This 1951 statute (c. 522) authorizes the Governor to allocate sums from appropriations of the Civil Defense Agency to other state agencies to meet contingencies arising from executive orders issued by the Governor under the Civil Defense Act of 1950, as amended. Such redirections of funds (including federal grants) may be made thus, provided they are recommended by the Secretary for Administration and Finance, and are approved by the Director of Civil Defense.⁴

The Governor, for like reasons, may transfer funds from the accounts of other state agencies to the Civil Defense Agency for civil defense emergency purposes, upon the recommendation of the Secretary for Administration and Finance, while the General Court is not in session. Money appropriated to meet payments due on bonds may not be so transferred, however.⁵

Forestry Laws

The statutes relating to the forests and woodlands of the state

¹Acts of 1953, c. 65† and Acts of 1954, c. 618.

²Acts of 1955, cc. 698, 699 and 739; 1956, cc. 208 and 236; 1978, c. 514.

³Acts of 1957, c. 451 and Acts of 1978, c. 514.

⁴Acts of 1951, c. 522, ss. 1-2.

⁵*Ibid.*, s. 3.

authorize the Governor to close the same in whole or in part by means of proclamations whenever he concludes that "extreme drought" has raised a danger of fire in those woodlands. A proclamation may limit access to the closed woodlands to owners and tenants of land therein, their agents and employees, and persons bearing permits from such owners or tenants to enter upon the land for reasons other than hunting, trapping or fishing. Furthermore, the possession of firearms within closed areas may be forbidden by the Governor's proclamation.¹

Once the fire hazard has passed, the Governor may reopen the woodlands, and, by like proclamation, extend any postponed or interrupted hunting, trapping or fishing "open season" by not more than the number of days lost due to the above suspension or interruption. If the extension of such an "open season" in whole or in part coincides with any other "open season" in such a manner as to cause a conflict in the laws controlling the same, the Governor may, by proclamation, postpone the latter "open season" for such time as may be necessary to avoid that conflict.²

Each of these proclamations takes effect as stated therein, and must be published in such newspapers, and posted in such places, by the Department of Fisheries, Wildlife and Recreational Vehicles as the Governor orders.³

Statutes Relating to Labor-Management Disputes

Slichter Act

This statute, enacted in 1947, established mechanisms for intervention by the Governor in private sector labor-management disputes which threaten, or result in, a disruption of the production and distribution of essential goods and services in ways menacing the public health and safety.⁴ "Essential goods or services" are defined by the Slichter Act to include food, fuel, water, electric light or power, gas and hospital and medical services.⁵ The manufacture, mining, handling, transporting, storage, sale at wholesale or retail, and furnishing

1. G.L. c. 131, s. 81.

2. *Ibid.*

3. G.L. c. 131, s. 81; Acts of 1975, c. 706, s. 221.

4. Acts of 1947, c. 596; G.L. c. 150B.

5. G.L. c. 150B, s. 2.

of the foregoing essential goods and services fall within the reach of the statute, as do any processes or occupations necessary to the production and distribution of such goods and services.¹ The Slichter Act does not apply to employees subject to the Federal Railway Labor Act,² to the state government, or to political subdivisions of the state.³

If the State Commissioner of Labor and Industries finds that a labor dispute affecting the production and distribution of essential goods and services has not been settled by collective bargaining, and that a substantial interruption of such production or distribution is imminent, he must notify the Governor of the situation. If, after prescribed investigations and hearings, the Governor determines that such an interruption is likely to be detrimental to the health or safety of any community, he may authorize state intervention in the particular labor-management. The Slichter Act outlines two different procedures which the Governor may follow in pursuing a peaceful settlement of the issues in dispute.⁴

Should such state mediation fail to produce a settlement, the Governor may then invoke his emergency powers under the Slichter Act, through the issuance of a proclamation or "declaration of emergency" to cope with the impending or actual interruption in the production or distribution of essential goods or services. The Governor may enter into agreements with the parties to the dispute for continuing such production or distribution to the extent necessary to safeguard the public health or safety; and he may "make and promulgate rules and regulations" to implement those agreements. The Governor may also take possession of, and operate, any plant or facility of a party to the dispute. He may exercise his authority on this score through any state agency, with the assistance of such public or private instrumentalities or persons as he may designate.⁵

State intervention in the labor-management dispute may be ended by a gubernatorial "declaration" whether the Governor determines that such intervention is no longer necessary to safeguard the public health and safety. He must terminate his declaration of emergency, and

Ibid.

¹ 45 U.S.C.A., s. 151 *et seq.*

² G.L. c. 150B, ss. 2 and 7.

³ G.L. c. 150B, ss. 1 and 3.

⁴ G.L. c. 105B, s. 4 (B) (1).

state operation of the plant or facility, when the parties to the labor management dispute report to him that they have reached a settlement. If the Governor fails to return control of the plant or facilities to the owners thereof after receiving that report, the aggrieved party may seek relief in the Superior Court or Supreme Judicial Court.¹

MBTA Statute

In 1962, the General Court granted emergency powers to the Governor to continue operations of the Metropolitan Transit Authority (MTA), predecessor of the present Massachusetts Bay Transportation Authority (MBTA), in the event of an interruption of Authority services in violation of an injunction.² These 1962 provisions were carried over *verbatim* into the 1964 law establishing the MBTA and defining its functions and powers.³ Neither statute mentions executive orders as the vehicle for exercise by the Governor of his emergency powers; but, executive orders are used customarily for that purpose.

Three preconditions are necessary before the Governor may declare an emergency and take possession of MBTA lines and facilities. Firstly, there must be a "continued interruption, stoppage or slowdown" of passenger transportation on "any vehicle or line" of the MBTA, or a strike causing the same. Secondly, that interruption of transit service must be in violation of an injunction, restraining order, or other order of a court of competent jurisdiction. And, thirdly, the interruption, stoppage or slowdown must threaten the availability of essential passenger transportation service to such an extent as to endanger the health, safety or welfare of the community.⁴

During an emergency so declared by him, the Governor may assume control of the lines and facilities of the MBTA, and operate them for the account of the Authority in order to safeguard the public health, safety and welfare, for a period not exceeding 45 days. He may exercise these powers and responsibilities through any state agency, or through any person or persons, he sees fit to designate. He may also designate

1. G.L. c. 150B, s. 4c and s. 4d.

2. Acts of 1962, c. 307, s. 1, adding new s. 19A to Acts of 1947, c. 544.

3. Acts of 1964, c. 563, s. 18; G.L. c. 161A, s. 20.

4. G.L. c. 161A, s. 20.

suitable public or private instrumentalities to assist in these emergency efforts.¹

Statutory Authority of Governor re Executive Branch Organization

Since 1919, the Governor has possessed statutory authority to place in any state department any state "offices, boards, commissions and other governmental organizations and agencies" not assigned by statute to some department. His authority on this score does not extend to state agencies placed by statute directly under the Governor and Council. This 1919 law makes no mention of executive orders as means of accomplishing its ends, thus leaving to gubernatorial discretion the determination as to the best legal way to be employed. Such a gubernatorial assignment of state agencies to departments remains in force until the General Court sees fit to act on the same.⁴

The Governor's Cabinet Act of 1969, since amended, provides for the organization of all agencies of the executive branch — except departments headed by the four "constitutional officers," and 28 state higher educational institutions grouped under the State Board of Regents — into ten "Executive Offices," each headed by a "Secretary" who is a member of the Governor's Cabinet. Currently, these ten entities consist of the Executive Offices for: (1) Administration and Finances, (2) Communities and Development, (3) Consumer Affairs, (4) Elder Affairs, (5) Energy Resources, (6) Environmental Affairs, (7) Human Services, (8) Manpower Affairs, (9) Public Safety and (10) Transportation and Construction.⁵

While the Governor's Cabinet Act of 1969 assigned the numerous state administrative departments, boards, commissions, public authorities and other named units to particular Executive Offices, it granted to the Governor, until 1973, the authority to transfer such units from one Executive Office to another, by means of executive orders.⁶ The State Department of Commerce and Development was so

Ibid.

¹ G.L. c. 29, s. 2; Acts of 1964, c. 740.

² G.L. c. 6, s. 17; c. 29, s. 2.

³ G.L. c. 29, s. 2.

⁴ Acts of 1969, c. 704; Acts of 1979, c. 796; Acts of 1980, c. 329, ss. 104, 106 and 112; G.L. c. 6, s. 17A; G.L. c. 6A; G.L. c. 7, ss. 2-3; G.L. c. 15A; G.L. c. 25A.

⁵ Acts of 1969, c. 704, ss. 50-50A.

transferred from the Executive Office of Communities and Development to the Executive Office of Manpower Affairs by Governor Francis W. Sargent in 1973.¹ Since then, such transfers have required statutory action. Newly-established state agencies not assigned to an Executive Office by law appear to fall within the reach of the Governor's authority under the foregoing 1919 statute, *via* assignment by him to a department within such an Executive Office.

The Governor's approval must be obtained by the head of any state department who has the authority, and who wishes, to establish in that department any division not specifically provided for by law.² By implication, the Governor has the authority to control such departmental actions by means of executive orders if he so chooses.

Governors have relied on the foregoing statutes and on their authority as supreme executive magistrates to sustain executive orders creating administrative units within state departments, or to transfer such units where no violation of the statutes would result. Thus, by executive order, Governor Christian A. Herter transferred the Ground Observation Corps to the State Civil Defense Agency in 1955³ Governor John A. Volpe, in like manner, established a Governor's Committee on Fund-Raising in 1965 to regulate fund-raising within the state service by voluntary health, welfare and other charitable organizations.⁴ Executive orders issued by Governors Francis W. Sargent in 1972 and Michael S. Dukakis in 1976 established a State Office of Minority Business Assistance in the State Department of Commerce and Development, and defined its powers and duties;⁵ this action was subsequently ratified by the General Court.⁶

As indicated in Appendix A of this report, Governors have made frequent use of executive orders to designate particular Executive Offices or departments as the "state agency" to administer named federally-aided programs and projects in compliance with federal statutes, regulations and Presidential executive orders. Application by state agencies for federal grants require the prior approval of the

1. Executive Order No. 96 (1973).

2. G.L. c. 29, s. 3.

3. Executive Order No. 28 (1955).

4. Executive Order No. 48 (1965).

5. Executive Orders, Nos. 90 (1972) and 124 (1976).

6. Acts of 1978, c. 521, s. 2; G.L. c. 23A, s. 37.

Secretary for Administration and Finance; and no such grant in excess of \$100,000, and no such grant requiring a state appropriation of matching funds, may be accepted without the prior approval of the Committees on Ways and Means of the two branches of the General Court.¹ By executive orders not at variance with the statutes, the Governor may make those organizational and other administrative arrangements necessary to comply with federal grant requirements.

Executive orders creating or altering executive branch agencies are dependent, for their effectiveness, upon duly-appropriated funds; and no expenditure of such funds may be authorized except as provided by the General Court in the appropriation act.

State Administration Procedure Act Aspects

This law, enacted in 1954, regulates the adjudicatory and rule-making proceedings of state administrative agencies, and establishes related safeguards for the public.² It has partial application to executive orders issued by the Governor.

An "agency" subject to the requirements of the State Administrative Procedure Act is defined as —

. . . any department, board, commission, division or authority of the state government or subdivision of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings, *but does not include the following*: the legislative and judicial departments; *the governor and council*; military or naval boards, commissions or officials; the department of correction; the department of youth services; the parole board; the divisions of industrial accidents of the department of labor and industries; the personnel administrator; the civil service commission; and the appellate tax board.³

A "regulation" subject to the procedural and other standards of the act is defined as —

. . . the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof,

G.L. c. 29, s. 2C; Acts of 1980, c. 329, s. 11.

Acts of 1954, c. 681, s. 1; G.L. c. 30A.

G.L. c. 30A; s. 1 (2), as amended by Acts of 1979, c. 795, s. 3.

adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; . . . or (d) regulations relating to the use of public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings.¹

Due to the phrasing of the above definitions, gubernatorial executive orders which have a regulatory content affecting the persons, property, and procedural rights of the general public are not subject to the procedural standards and safeguards applied by this statute to rules and regulations made by individual agencies of the executive branch. The only requirement imposed by the State Administrative Procedure Act in relation to gubernatorial executive orders is that the State Secretary include in the *Massachusetts Register*, published biweekly, the texts of "executive orders, *except* those not having general applicability and legal effect or effective only against state agencies or persons in their capacity as officers, agents or employees thereof."²

A "spot check" of gubernatorial executive orders issued since 1954, exclusive of those issued under the Civil Defense Act and its related statutes, reveals significant regulatory content in some of them affecting the general public, or operations of local governments. In this category are executive orders which: (a) require state regulatory agencies to process their proposed rules and regulations through a Governor's Commission to Simplify Rules and Regulations, before proceeding further with them under the State Administrative Procedure Act,³ (b) establish affirmative action requirements,⁴ (c) regulate public ac-

1. G.L. 30A, s. 1 (5). Clause (e) was deleted by Acts of 1974, c. 361, s. 1.

2. G.L. c. 30A, s. 6, para. (2) (1), as amended by Acts of 1976, c. 459, s. 5.

3. Governor Edward J. King, Executive Orders Nos. 155 (1979), 167 (1979) and 187 (1980).

4. Governor Francis W. Sargent, Executive Order No. 74 (1970); Governor Michael S. Dukakis, Executive Orders Nos. 116 (1975), 117 (1975) and 143 (1978).

cess to state records,¹ (d) regulate the disqualification of certain contractors as participants in state projects,² (e) regulate the distribution of motor fuels in times of shortages,³ (f) establish state policies for barrier beach conservation and development,⁴ and (g) bar off-road vehicles ("dune buggies") from publicly-owned dunes, beaches, salt marshes, tidal flats and wildlife habitats.⁵

Were such regulations to be made by a state agency other than one specifically exempted by the State Administrative Procedure Act, they would have to be formulated in accordance with the procedures and safeguards mandated by that statute, and would be subject to judicial review thereunder. Before the regulation could take effect, the state agency would be obliged to give public notice in the *Massachusetts Register* of its intent to adopt the regulation, and, unless otherwise provided by law, would have to hold a public hearing on it.⁶ The agency would be required to file with the State Secretary a statement of the estimated fiscal impact of the proposed regulation upon both the public and private sectors.⁷ Once adopted in conformity with these statutory provisions, the final version of the regulation would then be published in the *Massachusetts Register* as part of the *Code of Massachusetts Regulations*.⁸

In addition, if a state agency subject to the State Administrative Procedure Act engages in adjudicatory proceedings under its statutes or regulations to determine the legal rights, duties or privileges of specifically named persons, it must follow uniform adjudicatory procedural rules prescribed by the Secretary of Administration and Finance if that determination is required by statute or on a matter of constitutional right.⁹ Rights, duties or privileges ordained by a gubernatorial executive order in the absence of an enabling law may involve

Governor Francis W. Sargent, Executive Order No. 75 (1970).

Governor Michael S. Dukakis, Executive Order No. 147 (1978).

Governor Edward J. King, Executive Order No. 160 (1979). This order cited many legal bases, including the Civil Defense Act.

Governor Edward J. King, Executive Order No. 181 (1980).

Governor Edward J. King, Executive Order No. 190 (1980).

G.L. c. 30A, ss. 2-3A.

G.L. c. 30A, s. 5.

G.L. 30A, ss. 6-6A.

G.L. 30A, ss. 1(1), 9-10.

constitutional rights, but not necessarily proceedings required by statute.

It is evident that these "regulatory" gubernatorial executive orders may be used intentionally or unintentionally to by-pass standards established by the General Court in the State Administrative Procedure Act, in relation to rules, regulations and proceedings which have to do with matters other than "the internal management or discipline" of individual state agencies. Thus, there is a gap in the protections which the General Court endeavored to assure to the public in that statute.

CHAPTER VI. OTHER ASPECTS OF GUBERNATORIAL EXECUTIVE ORDERS IN MASSACHUSETTS

Number and Subject Matter

Number of Executive Orders

To date, no index nor enumeration has been compiled relative to executive orders and proclamation issued by Governors of Massachusetts since 1780. Undoubtedly, such orders were issued from time to time in an unsystematic way, with publication being accorded only to proclamations, prior to 1941. Executive orders, other than proclamations, are believed to have taken the form in most instances of letters and memoranda sent by the Governor to the heads of state agencies answerable to him.

The first Governor to introduce a systematic procedure for numbering or filing executive orders was Leverett Saltonstall (1941-45), who initiated such practices in respect to executive orders promulgated by him under the War Powers Act of 1941-42. This "old series" of executive orders, which numbered 99 in all, continued until 1947, when the wartime enabling acts lapsed.

No other executive orders were reported by the State Secretary to have been issued during the brief interval from 1947 to the passage of the Civil Defense Act of 1950, during the administration of Governor Paul A. Dever (1949-53). With the enactment of that statute, Governor Dever initiated the present "new series" of executive orders, which began with his Executive Order No. 1 of 1950 relative to civil defense

matters, and which has continued to date. Through December 31, 1980, a total of 192 "new series" executive orders had been issued, including two with "A" suffixes (42A and 166A).

Thus, a total of 291 executive orders of these two series, catalogued in Appendix A of this report, have been issued since 1941. This count omits purely ceremonial proclamations, which now exceed 80 annually. The following Table I presents a breakdown of these 291 executive orders by governor and by broad subject categories

Of the 11 chief executives who have occupied the governorship since 1939, Governor Leverett Saltonstall has issued the greatest number of executive orders (75), while the least number thereof were issued by Governor Robert F. Bradford (2) and Endicott Peabody (3). Following the end of World War II hostilities, the number of executive orders issued by each Governor dropped sharply until 1965. Thereafter, that number began to rise significantly, to a peak of 48 executive orders promulgated by Governor Francis W. Sargent.

Subject Matter of Executive Orders

Since the initiation of the two numbered series of executive orders in 1941, there has been a significant shift in their subject matter, and hence the uses made of executive orders by Governors. As revealed by Table I, the "lion's share" (97) of the 136 executive orders issued prior to the first administration of Governor John A. Volpe (1961-63) were concerned with civil defense administration and non-war emergencies (the Worcester Tornado of 1953, the 1954 Hurricane, flood disasters in western Massachusetts in 1955, and fire hazards in forests). Of the 155 executive orders issued since January of 1961, only 13 relate to civil defense and non-war emergency matters, while 142 pertain to other subjects.

Table 1.
Number and Subject Matter of Gubernatorial
Executive Orders in Massachusetts

<i>Governor</i>	Total No. EOs	Civil Def.¹	Nonwar Emer- gencies²	State Agency Organ.³	Fed. Aid Impl.⁴	Other State Admin.⁵	Other Subjects⁶
Leverett Saltonstall (1939-45)	75	51	—	2	1	16	5
Maurice J. Tobin (1945-47)	22	7	9	1	1	3	1
Robert F. Bradford (1947-49)	2	2	—	—	—	—	—
Paul A. Dever (1949-53)	19	15	—	—	1	1	2
Christian A. Herter (1953-57)	12	4	5	1	—	1	1
Foster Furcolo (1957-61)	6	2	2	—	1	1	—
John A. Volpe (1961-63)	7	1	2	—	4	—	—
Endicott Peabody (1963-65)	3	1	—	—	1	—	1
John A. Volpe (1965-69)	19	2	—	12	5	—	—
Francis W. Sargent (1969-75)	48	1	—	33	6	6	2
Michael S. Dukakis (1975-79)	37	1	1	18	8	5	4
Edward J. King (1979-)	41	—	4	27	4	6	—
Totals	291	87	23	94	32	39	16

- Civil Defense*: organization, administration and function of state and local civil defense agencies; air raid, blackout and evacuation plans and regulations; wartime regulation of business, public transportation, agriculture and employment; rationing and allocation of necessities of life in wartime.
- Nonwar Emergencies*: fire, flood and storm disaster; interruptions of public mass transportation services; housing, fuel and food shortages.
- State Agency Organization*: creation, alteration and abolition of advisory bodies and coordinating bodies; creation, alteration, transfer and abolition of administrative agencies. (Except the State Civil Defense Agency.)
- Federal Aid Implementation*: designating particular state administrative units as the "state agency" for administering federally-aided programs; otherwise implementing federal grant-in-aid requirements and programs.
- Other State Administration*: state personnel; delivery of state services; programs of state agencies; labor of inmates of state institutions; state buildings; use and administration of state lands.
- Other Subjects*: Affirmative action and anti-discrimination regulations; state armed forces; aid to dependents of armed forces personnel; military chaplains; observances of holidays and days of national rejoicing or mourning.

Formulation of Gubernatorial Executive Orders

Procedural Aspects

Informal Controls. No formalized procedures and standards have been mandated by statute nor gubernatorial executive order for the formulation and adoption of such orders. Hence, such activity is governed by custom and convenience, without iron-bound rules.

To date, the courts have had no occasion to determine the circumstances and conditions under which the General Court may, by statute, regulate the formulation and adoption of executive orders by the Governor. A partially-related advisory opinion of the Attorney General, rendered in 1948, suggest that the Governor has exclusive jurisdiction of that subject, under the Separation of Powers Doctrine, in relation to executive orders which (a) establish policies of his administration and (b) relate solely to internal "housekeeping" matters of the executive branch not directly involving the general public.¹

In contrast, it is more likely than not that the courts would sustain, as within the reach of the general legislative authority of the General Court,² statutes reasonably regulating the adoption of gubernatorial executive orders affecting (a) the government, property and affairs of political subdivisions of the state,³ (b) the eligibility of persons to seek public employment, contracts or benefits,⁴ or (c) the persons, property and procedural rights of the general public or any segment thereof.⁵

Practices of Peabody Administration. Like Governor Robert F. Bradford, Governor Endicott Peabody made conservative use of the gubernatorial executive order as an instrument of policy and administration.

In conversations with the Legislative Research Bureau staff, Mr. William A. Waldron, who served Governor Peabody as Commissioner of Administration,⁶ stated that it was the Governor's policy to require

1. Report of the Attorney General for the Year Ending June 30, 1948, (Mass. Public Doc. No. 12), pp. 48-50.

2. Mass. Const., Part II, c. I, s. I, Art. IV.

3. Mass. Const., Amend. Art. II, ss. 1 and 8, as appearing in Amend Art. LXXXIX (1966).

4. *Opinions of the Justices*, 138 Mass. 601 (1885), 165 Mass. 599 (1896); *Cullen v. Mayor of City of Newton*, 308 Mass. 578 (1941); *Nichols v. Commissioner of Public Welfare*, 311 Mass. 125 (1942); *Town of Milton v. Civil Service Commission*, 365 Mass. 368 (1974).

5. On the grounds that their matters are external to the executive branch, and hence administrative regulatory and adjudicatory subjects within the constitutional province of the General Court. *Commonwealth v. Libbey*, 216 Mass. 356 (1914); *Boston Elevated Ry. Co. v. Commonwealth*, 310 Mass. 528 (1942); *Opinions of the Justices*, 211 Mass. 605 (1912), 334 Mass 711 (1956).

6. The Commissioner of Administration is also Secretary of the Executive Office for Administration and Finance (G.L. c. 7, ss. 3-4).

all proposals for executive orders and non-routine proclamations to be submitted, together with supporting information, to the Commissioner of Administration for review and a recommendation to the Governor. Most proposals so received were originated by members of the Governor's staff and by state agency heads. Upon receipt of the proposed executive order or proclamation, the Commissioner's staff would evaluate the same for its appropriateness in terms of the Governor's policies, and for its compatibility with the constitutional and statutory powers of the Governor as defined by the courts.

If a proposed executive order or proclamation purported to have binding legal effect on agency operations or activities, or appeared to affect the persons, property and rights of the general public, it would not be recommended favorably to the Governor by the Commissioner of Administration unless it were clearly based on an enabling statute, such as the Civil Defense Act. If the proposed text were more than "cosmetic" or "public relations" in nature, the Commissioner required those proposing the executive order or proclamation to cite the constitutional or statutory provision on which the order or proclamation was to be based. He would then have his staff check the matter out legally, to ascertain whether the document would "hold water" if challenged in the courts. In addition, it was the Administration's desire to avoid any valid accusation that it was usurping the powers reserved to the General Court.

Once these procedures were completed, the proposed executive order or proclamation would be transmitted to the Governor by the Commissioner of Administration, together with his findings and recommendations. The ultimate decision was then made by the Governor. If that decision were favorable, the proposed executive order or proclamation, with any changes required by the Governor, would be sent to the latter's legal staff to be recast in final form.

This practice tended to discourage uses of executive orders and proclamations which the Commissioner of Administration determined to be needless, trivial or illegal.

Practices of King Administration. The Office of Legal Counsel to His Excellency, Governor Edward J. King, reports use of very simple procedures in respect to the issuance of gubernatorial executive orders and nonroutine proclamations.

State agencies or "outside groups" desiring issuance of an executive order or proclamation may request the same verbally or in writing directly of the Governor. This request is then referred by the Governor to his Chief Legal Counsel for investigation. After consulting with the proponents of the proposed order or proclamation, that Office makes a recommendation to the Governor, based on its assessment of the legal and policy aspects of the document. If the recommendation is favorable, a final polished text of the proposed executive order or proclamation accompanies that recommendation. The Governor's decision on the matter is final.

Format of Gubernatorial Executive Orders

Most executive orders of Massachusetts Governors are three to five pages long, with occasional appearances of much lengthier documents, such as Governor Frances W. Sargent's Executive Order No. 74 of 1970 *re* a "Governor's Code of Fair Practices" (9 pages).

Typically, each executive order opens with one or more "whereas" statements of the reasons for, and the purposes of, the executive order.

Next, there is a specific or generalized statement of the authority by which the Governor issues the executive order. Until 1967, it was customary for Governors to cite specific statutes as the legal basis for their executive orders. Since then, it has become prevailing practice for Governors to refer in vague general terms only to their authority as "Supreme Executive Magistrate," or to "all the authority" vested in them "by the Constitution and the statutes of the Commonwealth," or both, with but rare occasional citations of specific statutes. This procedure confronts potential challengers of given executive orders with the burden of ascertaining whether, in fact, those orders have a valid legal basis.

These preliminaries out of the way, the executive order then presents its substantive content. One of the shorter executive orders, quoted in full below, is offered as a sample:

THE COMMONWEALTH OF MASSACHUSETTS**By His Excellency****Michael S. Dukakis
Governor****EXECUTIVE ORDER NO. 140****MASSACHUSETTS OCCUPATIONAL INFORMATION
COORDINATING COMMITTEE**

WHEREAS, there is a need to develop a comprehensive system to provide occupational information to planners, researchers and administrators of the Commonwealth; and

WHEREAS, employment and training information must be provided to administrators of the Commonwealth in order to evaluate, plan and allocate resources for educational, employment, and training programs; and

WHEREAS, there is a need to coordinate the development of this information to avoid duplication of effort and to fully utilize available information and coordinate resources; and

WHEREAS, Public Law 94-482, amending the Vocational Education Act of 1963, provides for and requires that a State Occupational Information Coordinating Committee perform these important responsibilities with funds available to it from the National Occupational Information Coordinating Committee; and

WHEREAS, the enactment by the United States Congress of said Public Law 94-482, provides for and requires the establishment by the Commonwealth of a State Occupational Information Coordinating Committee composed of representatives of Massachusetts Board of Education, the Massachusetts Division of Employment Security, the State Manpower Services Council, and the agencies administering the Vocational Rehabilitation Programs:

NOW, THEREFORE, I, Michael S. Dukakis, Governor of the Commonwealth, by virtue of the authority vested in my as supreme executive magistrate, do hereby order as follows:

1. The Massachusetts Occupational Information Coordinating Committee, hereinafter referred to as the Committee, is hereby established and the Committee is designated as the State agency to perform the functions and fulfill the responsibilities of the State Occupational Information Coordinating Committee, which Committee is denominated and which functions and responsibilities are set out in Title II of Public Law 94-482.

2. The Committee shall be composed of:

(a) The Associate Commissioner of Education for Occupational Education, representing the Massachusetts Board of Education;

(b) The Chairman of the State Manpower Services Council, or his designee, representing the State Manpower Services Council;

(c) The Director of the Division of Employment Security, representing the Division of Employment Security;

(d) The Commissioner of Rehabilitation or the Commissioner of the Blind, as they may agree, representing the agencies administering the Vocational Rehabilitation Program.

3. For the purpose of administration the Committee shall be considered a State agency in but not under the Executive Office of Manpower Affairs.

4. The Committee shall provide for such advisory or associate members as the members of the Committee shall deem appropriate.

5. The Committee shall develop and implement an occupational information system in the Commonwealth which will meet the common needs for information for the planning for and the operation of programs of the Massachusetts Board of Education assisted under the Vocational Education Act of

1963 as amended and of the administering agencies under the Comprehensive Employment and Training Act of 1973.

6. The Committee will serve the purposes of applicable provisions of Public Law 94-482 and any successor legislation, consistent with the requirements of state law.

7. The Committee may employ an Executive Director and such other staff as it may require to perform its functions. The Executive Director and the staff employed by the Committee shall be appointed by the Secretary of Manpower Affairs upon the approval of the Governor and of the Committee.

8. The time and place of meetings of the Committee shall be as provided for by the rules of the Committee.

Given at the Executive Chamber in Boston this 15th day of November in the year of our Lord one thousand nine hundred and seventy-seven and of the Independence of the United States of America, two hundred and second.

/s/ MICHAEL S. DUKAKIS
Commonwealth of Massachusetts

Special Problems Posed by Certain Gubernatorial Executive Orders

Four executive orders examined by the Legislative Research Bureau contain odd features posing special legal problems under the Separation of Powers Article of the Constitution.

Executive Order No. 115 of 1975, issued by Governor Michael S. Dukakis, increased by two members the number of members of the Security and Privacy Council fixed by statute¹. The two individuals so added, as members *ex officio*, were the Attorney General and the State Secretary (or their designees). Here the issue is whether the executive order illegally amended a statute.

1. G.L. c. 6, s. 170.

Three other executive orders creating study entities included in the membership thereof legislators appointed or nominated by the Senate President and the Speaker of the House of Representatives. These were Executive Order No. 122 of 1975, issued by Governor Dukakis, establishing a Massachusetts Developmental Disabilities Council; Executive Order No. 176 of 1980 promulgated by Governor King, creating a Special Commission on the Laws and Regulations Governing the Alcoholic Beverages Industry; and, also by the latter Governor, Executive Order No. 184 of 1980, forming a Governor's Task Force on Probate and Family Court Procedures. The last-named group includes the Chief Justice of the Probate and Family Court Department of the Trial Courts.

These three committees are all entities of the executive branch, created unilaterally by the Governor, rather than by acts or resolves of the General Court (which require the concurrent action of that body and the Governor). Normally, study committees of commissions with "multi-branch" memberships are established in the latter manner, a long-standing practice implicitly recognized by the Constitution.¹ The Supreme Judicial Court has ruled, as noted earlier in this report, that legislators may not be named to commissions having substantive executive or administrative functions, without doing violence to the Separation of Powers Doctrine.² There remains the question as to whether a committee or commission created by the Governor, within his own branch of the state government, with advisory or study authority only, is truly an "administrative" entity and hence one on which legislators may not serve.

CHAPTER VII. GUBERNATORIAL EXECUTIVE ORDERS IN OTHER STATES

State Practices Generally

Variety of Authority

The responses of 49 other states and one territory to inquiries of the Legislative Research Bureau reveal significant variations from one jurisdiction to another in respect to the constitutional and statutory authority of their governors to issue executive orders, and to the extent to which these orders are used.

¹ Mass. Const., Amend. Art. LXV (1918).

² *Opinions of the Justices*, 302 Mass. 605 (1939).

The use of purely ceremonial proclamations and executive orders by governors appears to be widespread, as these documents have little, if any, legal impact, and may be issued easily by a governor whether or not so required or authorized by statute. In contrast, governors are circumscribed by constitutional, statutory and judicial case law in the issuance of executive orders having the force of law, especially those the violation of which involve fines or other penalties, or which affect the persons, property and rights of the general public.

The use of executive orders is a by-product of the growth of the constitutional, statutory and political authority of state governors since the Great Depression, and especially since World War II. At least eight other states replying to Legislative Research Bureau inquiries indicated that their respective governors have been making substantial or significant use of nonceremonial executive orders, especially since the mid 1960's (Calif., Colo., Fla., Ill., Ky., Miss., N.Y. and Wis.).

Unable to legislate in detail on all the myriad complex problems of a modern society, state legislatures, like Congress, are finding it increasingly necessary and expedient to delegate regulatory and other administrative authority to their governors and executive branch agencies to implement, administer and enforce legislatively-determined policies and programs, subject to applicable constitutional and statutory guidelines and restraints. State constitutions, statutes and judicial case law vary, from one state to another, or to the powers which may be so delegated, their scope, and uses. Similarly, they also vary as to the breadth of constitutionally "inherent" powers available to the Governor as chief executive, in the absence of specific statutory authorization to issue executive orders.

State Constitutional Provisions

Silent Constitutions. The constitutions of 40 states are wholly silent on the subject of the governor's authority to issue executive orders. Hence, in those jurisdictions, the governor must rely upon statutes specifically authorizing such orders, or upon judicial interpretations of his constitutional authority as chief executive, commander-in-chief of the state's armed forces, and as enforcer of the laws of the state, for his power to issue executive orders. (Ala., Ariz., Ark., Calif., Colo., Conn., Del., Ga., Hi., Ida., Ind., Ia., Ky., La., Me., Minn., Miss., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.D., Ohio, Okla., Ore.,

Pa., R.I., S.C., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis. and Wyo.)

Constitutions With Executive Order Provisions. Another ten jurisdictions have constitutional provisions specifically authorizing their governors to issue executive orders, proclamations or other directives of like character.

In this group are seven states and one territory which resemble Massachusetts, in that their constitutions authorize their governors to submit executive reorganization "plans" or "executive orders" which stand unless vetoed by one or both branches of the legislature, but make no other mention of the governor's power to issue executive orders (Alas., Ill., Kan., Md., Mo., N.C., S.D. and No. Mar.). An eighth state, which has such reorganization plan provisions in its constitution, also includes in its constitution provisions authorizing the Governor to issue executive orders reducing authorized state spending in the event state revenues anticipated for the fiscal year will be insufficient to fund the appropriations voted for that fiscal year by the legislature (Mich.).

Finally, Florida's constitution specifically allows the governor to issue executive orders (a) suspending from office, on one or more of the grounds enumerated in the constitutional provision, any state or county officer not subject to impeachment or to military disciplinary proceedings, (b) suspending from office any municipal elected officer who is awaiting trial under indictment, (c) suspending certain fines and forfeitures, (d) granting reprieves, commutations and pardons, and (e) restoring civil rights. Otherwise, the Florida Constitution is silent on the subject of gubernatorial executive orders.

State Statutory Provisions

In their responses to the Bureau questionnaire, at least 30 other states have enacted statutes authorizing their governor to issue executive orders with the force of law on certain subjects, in certain situations, and subject to certain statutory procedural or other requirements. (Ala., Calif., Colo., Fla., Ida., Del., Ky., La., Me., Md., Mich., Minn., Miss., Mo., Mont., Neb., N.H., N.J., N.D., Ohio, Okla., Ore., Pa., R.I., Tenn., Tex., Vt., Va., W.Va. and Wis.)

Civil Defense, Disasters and Other Public Emergencies. Of these 30 states, 16 reported statutes broadly authorizing the governor to issue

executive orders in civil defense and disaster emergencies (Colo., Fla., Ky., Me., Md., Mich., Minn., Miss., Mont., N.J., Okla., Ore., R.I., Tex., Va., and Wis.). Seven states authorize their governors to issue executive orders implementing their statutes relative to energy emergencies and energy conservation (Colo., Fla., Miss., N.J., Ore., R.I. and Wis.). Forests and woodlands may be closed by gubernatorial executive order in two states in the face of threatened or actual fire emergencies (Me. and Okla.). One statute controls the issuance of executive orders by the governor in relation to air pollution emergencies (N.J.). Another jurisdiction authorizes the Governor to issue executive orders regulating the distribution of food and other necessities of life in times of serious shortages thereof (Colo.). By statute, the governor of Florida may issue executive orders declaring water, crop and refugee emergencies. Finally, one state has empowered its governor, by statute, to issue executive orders giving immediate effect to state regulations in emergency situations (Ky.).

State Administration and Finance. At least 13 states empower their governors to issue executive orders in relation to executive branch reorganization plans required to be submitted to the legislature, or establishing the organization of executive branch agencies in circumstances where legislative prior approval thereof is not required (Calif., Ill., Ky., La., Md., Mich., Miss., Mo., Mont., Okla., Vt., Va. and W.Va.). In seven states, the governor is authorized by statute to issue executive orders creating advisory, coordinating, study or investigative committees or commissions within the executive branch (Md., Mich., Minn., Mo., Ohio, Tex. and Wis.).

Information received from six states indicates that their statutes empower their governors to issue executive orders in respect to state involvement in federally-aided programs and projects, or certain of them, and implementation of relevant requirements mandated by federal laws and regulations (Ky., Md., Mo., Mont., Ohio and Vt.).

Statutes of eight states authorize the governor to issue executive orders relative to certain aspects of state personnel administration, including: (a) the compensation of specified state officers and employees, or classes of such officers and employees (Ky., Neb. and Wis.); (b) implementation of the state merit system or civil service law (Okla. and W.Va.); (c) implementation of certain aspects of the state em-

ployees' retirement laws (Ky.); (d) out-of-state travel by state personnel (Wis.); (e) the regulation of hiring, hours of work and other aspects by state personnel administration under the state personnel code (Md. and Miss.); and (f) the reassignment of state attorneys and public defenders (Fla.).

Statutory authority has been conferred upon the governors of seven states to issue executive orders controlling other phases of state administration, to wit: (a) the contents of annual reports of state agencies (W. Va.); (b) the granting of time extensions for the filing of veterans' bonus applications (Ky.); (c) state agency procedures for dealing with the general public (Md.); (d) the administration of state contracts and contract procedures (Ky.); (e) the leasing of state property (Va.); (f) prison administration (Miss.); (g) administration of the statutes relative to pardons (Miss.); (h) the acquisition, maintenance and use of state-owned motor vehicles (Va.); (i) the issuance of state property to bands (Wis.); and (j) assigning duties to the lieutenant-governor (Minn.). At least four states authorize their governors to promulgate executive orders relative to the administration and government of the armed forces of the state (Miss., N.J., N.D. and Wis.).

The statutes of one state, New Hampshire, authorize its governor to issue executive orders (a) providing for investigation of the management and finances of state agencies, (b) reducing spending by a state agency if such spending will deplete that agency's appropriations before the end of the fiscal year, and (c) reducing any or all authorized expenditures by state agencies if state revenues decline for three consecutive months. The annual state appropriation act of a second New England state, Rhode Island, empowers the governor to issue executive orders transferring or reallocating, in whole or in part, the appropriations for any function which is transferred from one state agency to another. By statute, Wisconsin's governor may impound or freeze certain excess state matching funds.

Other Subjects of Gubernatorial Executive Orders. Miscellaneous statutory provisions reported by other states include those authorizing gubernatorial orders or proclamations having the force of law in relation to: (a) financial institution emergencies (Me.), (b) the designation of game and wildlife areas under state conservation laws (La.), (c) the taking effect of a change in the form of government of a city under state

home rule laws (Okla.), (d) the taking effect of certain county boundary changes under the laws relating thereto (Okla.), (e) the formulation of regional planning commissions (Wis.), and (f) authorizing or vetoing the activation of environmental improvement authorities (Ala.).

*Statutory Procedural Standards re Gubernatorial Executive Orders.
State Practices Generally*

Varying State Approaches to Procedural Aspects of the Executive Order. In general, state responses to questionnaires sent out by the Legislative Research Bureau revealed few efforts by the legislatures of other jurisdictions to regulate the issuance of gubernatorial executive orders in any uniform manner.

In part, this reflects doubts of legal authorities in these states as to the constitutional competence of their legislature to regulate gubernatorial executive orders other than those issued by the governor in the exercise of powers and responsibilities delegated to him by the legislature itself. Hence, executive orders issued by the governor in the exercise of his inherent constitutional authority as chief executive, such as policy directives to agencies of the executive branch not headed by popularly-elected boards or department heads, are viewed in many states as the internal business of the executive branch and the subject of gubernatorial prerogatives protected by the Separation of Powers Doctrine.

Where gubernatorial executive orders do fall within the reach of regulation by the legislature, because they involve the discharge of duties and functions assigned to the governor by statute, there is evidence of a disposition of legislatures to minimize the "red tape" associated with the issuance of such orders, especially when they relate to wartime emergencies, civil defense, and natural and man-made disaster situations. Many state legislatures, which have delegated nonemergency duties and functions to their governors, have not had occasion as yet to weigh the merits of standardizing uniform procedures to be followed by the governor in issuing executive orders in relation to such delegations of authority. Thus, procedural standards, to the extent that they exist, appear to be formulated by the legislatures of most states on a statute-by-statute basis, each delegating law setting its own requirements.

Filing and Publication Requirements. Of the 49 other states, at least 12 have general statutes which require the filing of gubernatorial executive orders, or certain of them, with the secretary of state or some other designated officer for recording and publication (Ida., Ky., La., Md., Mich., Minn., Miss., N.C., Pa., Tenn., Va. and Wis.). Like Massachusetts, at least four of these 12 states include such executive orders in a systematic "state register" or "code" of state rules, regulations and orders which is published periodically (La., Minn., Va. and Wis.); a fifth state publishes gubernatorial executive orders having the force of law as an appendix in its volumes of session laws (N.C.). Not included in this group of 12 states are two which simply require that the governor keep a record of his executive orders in his office (Kan. and Me.).

Only six states reported that executive orders, or certain of them, are subject to their respective uniform state administrative procedure acts (La., Md., Mich., Miss., Tenn. and Wis.). However, as in the case of Massachusetts, the act's coverage appears to be limited to the required filing of gubernatorial executive orders with the secretary of state. Of the 49 states, 37 replied that gubernatorial executive orders are not subject to any uniform state administrative procedure act provisions (Alas., Ariz., Ark., Calif., Colo., Conn., Ga., Hi., Ida., Ill., Ind., La., Kan., Ky., Me., Minn., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Okla., Pa., R.I., S.C., S.D., Tex., Utah, Vt., Wash., W.Va. and Wyo.) The remaining six states did not indicate the applicability or nonapplicability of uniform state administrative procedure act requirements to gubernatorial executive orders, or gave answers which were not clear (Ala., Del., Fla., Ohio, Ore. and Va.).

Legislative Review Aspects. No less than seven states require certain gubernatorial executive orders to be filed with committees or officers of the legislative branch for their information, action, or both (Ky., Md., Mo., N.C., Ohio, Tenn. and Vt.).

In Kentucky, copies of gubernatorial executive orders giving immediate effect to state agency regulations must be filed with the Legislative Research Commission.¹

The Governor of Maryland, under that state's administrative procedure law, must file with the Department of Legislative Reference copies of his executive orders relative to the organization and adminis-

¹ Ky. Rev. Stats., s. 43.085(2).

tration of the state executive branch, the creation of study commissions, state personnel, and procedures to be followed by state agencies in dealing with the public.¹ Under a temporary statute due to expire early in 1981 unless renewed by the legislature, the Governor of Maryland is required to submit executive orders establishing energy emergency regulations formulated by him under that law to the Joint Legislative Committee on Administrative, Executive and Legislative Review; if not disapproved by that committee within several days after such submission, such executive orders take effect.² If the committee cannot be assembled quickly because of extraordinary circumstances, the executive order may be put immediately into effect by the governor, subject to review and cancellation by the committee within seven days thereafter.³

North Carolina statutes simply require that gubernatorial executive orders which have the force of law be transmitted to the Legislative Services Officer for publication in an appendix of the session laws.⁴ Such orders thus become available for legislative scrutiny at an early date.

The Tennessee Administrative Procedure Act of 1974 mandates that all executive rules and regulations which would affect the property and activities of the general public be submitted to the Legislature's Joint Government Operations Committee for prior approval. More detailed information on this law and its attendant practices had not been received by the Legislative Research Bureau at the time of the writing of this report.

Executive Orders Involving "Federal" Commitments. Of the seven states providing for legislative involvement in gubernatorial executive order procedures, three do so with a view to curbing uses of such orders which may commit the state to expenditures in relation to federally-aided programs not previously approved by the legislature (Mo., Ohio and Vt.).

Missouri statutes authorize the governor to issue executive orders creating advisory committees and councils as required by federal aid requirements. While such an executive order takes effect immediately, it must nevertheless be submitted to the legislature, either branch of which may void the executive order by a resolution of disapproval.

1. Md. Code Ann., Art. 41, ss. 15CA-15CE.

2. *Ibid.*, s. 15B (c-1)(4).

3. *Ibid.*

4. N.C. Rev. Code, s. 147-16.1.

Such committees and councils are required to make annual reports, copies of which must be furnished to the Missouri Legislative Library.¹

In Ohio, it is allowed, by executive order, to commit the state to participation in a federal program for up to one year when participation is not authorized by existing state law, and to pay a state matching contribution if available, from existing state appropriations and authorizations. Such commitments require the prior approval of the State Controlling Board, which consists of the Director of Budget and Management, the respective chairmen of the Senate and House Finance and Appropriations Committees, two senators named by the Senate President, and two members of the House of Representatives named by its Speaker.²

Ohio statutes further empower the governor to issue executive orders designating state departments as "state agencies" for the management of federally-aided programs, and creating advisory bodies, as may be necessary to qualify the state and its political subdivisions for participation in federal programs. Such executive orders may not be in effect for more than three years.³

Similarly, the Vermont Legislature has, by statute, circumscribed the authority of the governor to commit the state to federal programs by executive orders or otherwise. The state laws forbid him to authorize participation by the state in a new federal program while the legislature is sitting, without that body's prior approval. If the legislature is out of session, the governor may not accept the renewal of an existing federal grant, or accept a new federal grant, without the prior approval of the Joint Fiscal Committee of the Vermont Legislature. In this latter instance, he must furnish the Fiscal Analyst, on the staff of that committee, with a statement indicating (a) the source of the grant, (b) the legal bases of the grant, (c) an estimate of the present and future direct and indirect costs related to the grant, (d) whether the grant involves a renewal of an existing program or establishment of a new program, (e) the state agencies which would be involved in its administration, (f) the purposes of the grant, and (g) the impact on existing programs if the grant is not accepted. If the Joint Fiscal Committee does not disapprove acceptance of the grant within 30 days following submission of the governor's statement, the governor's approval of the acceptance of the federal grant is final.

1. Rev. Stats. of Mo., ss. 26.500-26.540.

2. Ohio Rev. Code, s. 107.17.

3. *Ibid.*, s. 107.18.

4. Vt. Stats. Ann., Title 3L, Subtitle 1, c. 1, s. 5.

Executive Order Statute of Idaho

The Idaho Code grants general authority to the governor of that state to issue executive orders, and at the same time prescribes standards governing those orders, as follows:

. . . The supreme executive power of the state is vested by section 5, article IV, of the constitution of the state of Idaho, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing *executive orders* from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state. Such executive orders, when issued, shall be serially numbered for each calendar year and may be referred to and cited by such numerical designation and title. Each executive order issued hereunder shall be effective only after signature by the governor, attestation by and filing with the secretary of state, who shall keep a permanent register and file of such orders in the same manner as applies to acts of the legislature, and after publication in full in a newspaper or newspapers of general circulation in the state. Each such executive order issued by the governor must prescribe a date after which it shall cease to be effective, which shall be within two (2) calendar years of the effective date of such order, and if no date after which such order shall cease to be effective is contained in the order, then such order shall cease to be effective two (2) calendar years from the issuance thereof . . .¹

Executive orders may be issued by the Governor of Idaho in implementation and execution of any specific duties imposed by law, so long as those directives are consistent with applicable constitutional and statutory provisions.

1. *Ida. Code*, s. 67-802 (1974).

Executive Order Statute of Minnesota

While gubernatorial proclamations and executive orders are not subject to the state administrative procedure act of Minnesota, certain uniformity requirements are imposed thereon by the following statutory provisions elsewhere in that state's general statutes:

Proclamations. When the governor convenes the legislature in extra session he shall do so by proclamation, giving to the members such notice as he deems necessary of the time of meeting; and when assembled he shall inform them of the purposes for which they are convened. He shall set apart and proclaim one day in each year as a day of solemn and public thanksgiving to Almighty God for His blessings to the people and no business shall be transacted on that day at any of the departments of state. All proclamations of the governor required or authorized by law shall be filed with the secretary of state.¹

Executive Orders. Subdivision 1 — Applicability. A written statement or order executed by the governor pursuant to his constitutional or statutory authority and denominated by him as an executive order, or a statement or order of the governor required by law to be in the form of an executive order, shall be uniform in format, shall be numbered consecutively, and shall be effective and expire as provided in this section. Executive orders creating agencies shall be consistent with the provisions of this section and section 15.0593.

Subdivision 2 — Effective date. An executive order issued pursuant to sections 12.31 to 12.32 or any other emergency executive order issued to protect a person from an imminent threat to his health and safety shall be effective immediately and shall be filed with the secretary of state and published in the state register as soon as possible after its issuance. Emergency executive orders shall be identified as such in the order. Any other executive order shall be effective upon 15 days after its publication in the state register and filing with the secretary of state. The governor shall

1. Minn. Stats. Ann., s. 4.03.

submit a copy of the executive order to the commissioner of administration to facilitate publication in the state register.

Subdivision 3 — Expiration date. Unless an earlier date is specified by statute or by executive order, an executive order shall expire 90 days after the date that the governor who issued the order vacates his office.¹

The Governor of Minnesota is reported to rely primarily upon his implied constitutional powers as chief executive in issuing executive orders, as specific statutes authorizing such orders are not numerous in that state.

State Judicial Case Law re Gubernatorial Executive Orders

Sparse Nature of State Judicial Case Law

The state courts in the other 49 states have had relatively little occasion to rule upon the authority of their governors to issue executive orders, according to information supplied by their legislative research and reference agencies to the Massachusetts Legislative Research Bureau. Of these 49 jurisdictions, only 18 reported judicial opinions on this subject, with but few cases arising in any of those states over many years (Ala., Alas., Calif., Colo., Ill., Ind., Kan., Ky., Minn., Miss., N.H., N.J., N.Y., Okla., Pa., Tex., W.Va. and Wis.). Three more states reported rulings by their attorneys general or other legal officers only (Ariz., Md., and Ohio). A majority of 28 states indicated that they have no case law on the subject (Ark., Conn., Del., Fla., Ga., Hi., Ida., Ia., La., Me., Mich., Mo., Mont., Neb., Nev., N.M., N.C., N.D., Ore., R.I., S.C., S.D., Tenn., Utah, Vt., Va., Wash. and Wyo.).

Judicial Case Law in 21 States

Alabama. In 1947, the Alabama Supreme Court held that the governor could not, on his own authority as chief executive, by executive order or action create an investigating commission which included state legislators on its membership, cloak that commissioner with official status and provide for the payment of its expenses. Absent an enabling

1. *Ibid.*, s. 4.035.

tatute, such an executive order was ruled violative of the Separation of Powers Clause of the Alabama Constitution.¹

Citing his powers as "supreme executive," and his duty to take care that the state laws be faithfully executed, under the state constitution, Governor George C. Wallace issued three executive orders in 1963 requiring the maintenance of racial segregation in the Alabama public schools in defiance of federal court orders. These and other actions by the state on behalf of segregation were swept aside by the federal courts as violations of the Fourteenth Amendment of the Federal Constitution.

Alaska. The constitution of this state allows its governor to submit executive branch reorganization plans, in executive order form, which take effect if not disapproved within 60 days by a joint session of the legislature.² The State Supreme Court ruled that this constitutionally-prescribed procedure need not be used to transfer from one state department to another a division or function which has not been placed in any department by statute, and that such transfers may be accomplished by the governor *via* executive orders not requiring submission to the legislature.³

Arizona. In 1980, the Arizona Legislative Council undertook a legal study, at the request of the State Auditor General, relative to the power of the Governor of Arizona to issue executive orders. The Council report found no definition of "executive order" in the statutes or case law of the state, that such orders are utilized by the Governor in the exercise of his implied powers under state constitutional and statutory provisions, and that the Governor has relied on federal law for implied authority to issue executive orders to bring the state into compliance with requirements of federal aid statutes and regulations. The Council was unable to determine under what circumstances a particular enforcement clause or penalty clause of a gubernatorial executive order would be legal.⁴

California. In 1906, the California Supreme Court sustained a gubernatorial executive order directing the publication of a bond issue statute prior to its submission to the voters, when the legislature, through an oversight, failed to make provision for such publication in

1. *In re Opinion of the Justices*, 249 Ala. 637 (1947).

2. Ala. Const., Art. III, s. 23.

3. *Suber v. Alaska State Bond Commission*, 414 P. 2d. 546, 556 (1966).

4. Ariz. Legislative Council, Memorandum to Douglas R. Norton, Auditor General, Phoenix, Ariz., April 24, 1980, 4 pp.-mimeographed.

that act as required by the California Constitution. The Court ruled that the Governor had acted within his constitutional obligation to see that the laws of the state be executed faithfully.¹ Subsequently, the Attorney General upheld a gubernatorial executive order of 1963 mandating a "Code of Fair Practices" barring racial discrimination in operations of state agencies as a valid measure by the Governor to implement state laws and policies against discrimination.²

Colorado. Ten years later, a less liberal view of gubernatorial authority was expressed by the Colorado Supreme Court when it struck down a gubernatorial executive order designating the State Board for Community Colleges and Occupational Education as the "state approving agency" under certain federal laws³ and regulations, for approving courses offered to veterans in public and private educational institutions in the state. The Court ruled that the Governor had exercised "legislative" power unconstitutionally, in that the legislature had enacted no law permitting him to create, or to designate, a state agency with authority to act on behalf of the federal government. Involved were relationships between veterans and the United States Veterans' Administration, rather than federally-aided state programs.⁴

Illinois. Another conservative view, expressed by the Illinois Supreme Court in 1839, held that of the three branches of that state's government, only the legislature possessed inherent constitutional powers, while the executive and judicial branches had only those powers expressly granted, or necessarily incident to powers so granted to them by the constitution.⁵ This case law placed a significant restraint upon the issuance of executive orders by Illinois chief executives until recent times.

Since the adoption of a new constitution in 1970, judicial attitudes on the subject of gubernatorial executive orders have modified somewhat. An executive order requiring financial disclosure by state employees in the executive branch has been sustained as a valid exercise of the governor's constitutional power as chief executive.⁶ The Illinois Supreme Court continues to emphasize, however, that the governor's

1. *Spear v. Reeves*, 148 Cal. 501 (1906).

2. Opinion of Calif. Attorney General to Governor Edmund G. Brown, Sr., July 24, 1963.

3. 38 U.S.C. s. 1771 (a).

4. *Colorado Polytechnic College v. State Board for Community Colleges & Occupational Education*, 173 Colo. 39 (1970).

5. *Field v. People*, 3 Ill. 79 (1839).

6. *Illinois State Employees Association v. Walker*, 57 Ill. 2d. 512 (1974).

constitutional authority to enforce existing laws may not be invoked to create new legal requirements beyond those prescribed by statute.¹

Indiana. More liberally, the Supreme Court of the neighboring State of Indiana has construed broadly the constitutional powers of the governor as supreme executive magistrate, and the constitutional latitude allowed to him to carry out his obligation to see that state laws are enforced faithfully.² The governor is viewed, judicially, as having powers comparable to those of the President of the United States, who has broad authority to issue executive orders relative to the internal administration of the executive branch of the federal government, and who must rely on statutory authorization only in respect to executive orders having the force of law, which apply to the persons, property and rights of the general public.³ However, the Governors of Indiana are reported to have made only modest use of these powers.

Kansas. In this state, the judiciary rejected charges that federal constitutional requirements that states maintain "republican" forms of government were abridged by Kansas constitutional provisions allowing the governor to reorganize executive branch agencies by executive orders subject to veto by either branch of the legislature.⁴

The Kansas Supreme Court concluded that the separation of powers is, indeed, an inherent aspect of a "republican form of government" in state and federal constitution law, but are subject to some bending. The Court held that the concept of the separation of powers is violated impermissibly in a "republican" framework if the legislative and executive powers are united in one person or body. However, such a violation was absent in this situation, the Court said, because: (a) Kansas constitutional provisions limited the governor's reorganization authority to the executive branch and did not allow him to touch the constitutionally-delegated functions of state officers and boards; (b) executive orders issued under these constitutional provisions could not add to executive branch functions, or extend agencies or functions beyond statutory expiration dates; (c) such executive orders could not alter the substance of state-local relationships; (d) those orders could not be invoked to require additional appropriations or revenues; and

1. *Buettel v. Walker*, 59 Ill. 2d. 146 (1974)

2. *Tucker v. State*, 218 Ind. 614 (1941); *Iowa Law Review*, Vol. 50 (1964-65), p. 88.

3. U.S. Const., Art. IV, s. 4.

4. Kan. Const., Art. I, s. 6.

(e) the Legislature had an absolute veto over any executive order issued under the challenged constitutional provision, which veto could not be overridden.

The Court held that even though the reorganization plan procedures vested the governor with legislative power, that power was limited, and no violence was done to the representative and republican character of the state government. A sharing of power was held to have resulted, and, the Court observed, power sharing is also a feature of republican forms of government.¹

Kentucky. The Supreme Court of Kentucky has invalidated, on separation of powers grounds, a gubernatorial executive order transferring functions, funds and personnel from one state agency to another, without prior statutory authorization.²

Maryland. An opinion of the Attorney General, rendered in 1980, has advised the Maryland State Ethics Commission that a state agency created by a gubernatorial executive order pursuant to law, or an agency regulation or order adopted under an enabling statute, is an agency, regulation or order "established by law," with the force of law. He declared that an agency is not "established by law" if the only basis for its existence is (a) the appointment of its members by the Governor, (b) its establishment pursuant to the general administrative authority of another agency, or (c) its establishment in response to a legislative resolution.³

Minnesota. In 1933, the Governor of Minnesota issued an executive order directing sheriffs in the state to delay mortgage foreclosure sales to a time certain, in an effort to respond to public opposition to such foreclosures which had reached violent stages in some agricultural states hard hit by the Great Depression. The Governor based his action on his duty under the constitution to enforce state laws, and the emergency conditions then prevailing. The Minnesota Supreme Court held that procedures relative to mortgage foreclosures had been prescribed by an emergency law, that the Governor could not depart from those procedures or suspend the laws without legislative authorization, and that his executive order was therefore invalid as an invasion of the legislative power.⁴

1. *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P. 2d. 223 (1973).

2. *Martin v. Chandler*, 318 S.W. 2d. 40 (1958)

3. *Opinion of the Attorney General*, No. 80-049 (July 25, 1980) (Md.).

4. *State ex rel. Lichtscheidl v. Moeller*, 189 Minn. 412 (1933).

In 1950, the Attorney General of Minnesota advised the Governor that the latter had no inherent authority to provide by executive order for cost-of-living increases in pay for state employees.¹

Mississippi. The Supreme Court of Mississippi has sustained, as a valid exercise of gubernatorial authority to enforce state laws, an executive order of 1938 wherein the Governor directed the National Guard to restore order in a region of the state in which normal law enforcement systems had broken down seriously.² This gubernatorial action was based solely on the constitutional mandate to the Governor to assure the enforcement of the laws, and not on any specific statute. Recently, the Attorney General has advised the Governor that he may not suspend a law unilaterally by executive order, except in situations in which martial law has been declared.³

New Hampshire. Between 1950 and 1978, the Supreme Court of the Granite State has had five occasions on which to address the subject of gubernatorial executive orders. On the positive side, the Court has held that the governor may, by executive order, create or designate state agencies with authority to receive federal funds.⁴ Negatively, it has ruled: (a) that the legislature may not give the Governor the power to reorganize executive branch agencies by executive orders subject to legislative veto;⁵ (b) that gubernatorial executive orders may not conflict with statutes;⁶ (c) that the governor may not issue executive orders relating conflicts of interest in employment among executive branch employees, in the absence of an enabling law;⁷ and (d) that, without statutory authorization, the governor may not regulate the hiring or promotion of state employees or state purchases of automobiles.⁸

New Jersey. A judicial ruling in New Jersey has held that a gubernatorial executive order must either find support for its validity in a state of facts which gives rise to an emergent situation, or must be based upon the furtherance of a legislative act or constitutional mandate.⁹ The courts have found that the governor has inherent power, as chief

1. *Opinion of the Attorney General*, October 4, 1950 (Minn.).

2. *State v. McPhail*, 182 Miss. 360 (1938).

3. *Opinion of the Attorney General*, August 9, 1979 (Miss.).

4. *Jeannot v. Personnel Commission*, 116 N.H. 376 (1976).

5. *Opinions of the Justices*, 83 Atl. 2d. 738 (1950).

6. *Opinions of the Justices*, 118 N.H. 582 (1978).

7. *Opinions of the Justices*, 16 N.H. 406 (1976).

8. *O'Neal v. Thomson*, 114 N.H. 155 (1974).

9. *DeRose v. Byrne*, 135 N.J. Super. 273 (Ch. Div. 1975).

executive, to issue executive orders designed to insure the efficient and honest performance of their duties by state employees under his jurisdiction.¹

New York. The courts of this state have agreed that the governor has inherent constitutional authority to issue executive orders in the discharge of his responsibilities as chief executive.² However, two judicial decisions of 1978 and 1979 have imposed constraints upon gubernatorial uses of executive orders.

In 1978, the New York Court of Appeals struck down a gubernatorial executive order requiring specified classes of state employees to file financial disclosure statements and to abstain from certain political and business activities.³ The Court declared that the governor has only those powers delegated to him by the constitution and statutes, and that he may not indulge in executive law-making on the claim that it is difficult or impossible to obtain enabling or other suitable legislation through the constitutionally-prescribed mechanisms. The Court agreed that the governor may issue executive orders applying only to those of his appointees who serve during gubernatorial pleasure. However, the Court found that it was for the legislature, through statutes, to regulate civil service (merit system) personnel, and employees or officers who serve for fixed terms and are removable only for cause. The Court further concluded that the executive order conflicted with certain provisions of the Public Officers Law.

The Court found that the governor may, in the exercise of his constitutional and statutory powers, order investigations of state agency operations and management, and direct the Attorney General to undertake investigations into public safety matters. It observed that the governor may make regulations, where specifically authorized by statute. However, while the Court of Appeals stressed that the governor's power to enforce the laws must be construed broadly, he may not go beyond stated legislative policies, prescribe remedial measures not contemplated by those policies or substitute "new context."

A decision of the State Supreme Court in 1978, affirmed by the Court of Appeals in 1979, invalidated, as an invasion of the province of the General Assembly, an executive order requiring contracts of state

1. *Kenny v. Byrne*, 75 N.J. 458 (1978).

2. *In the Matter of DiBrizzi*, 303 N.Y. 206 (1951).

3. *Rapp v. Carey*, 44 N.Y. 2d. 157, 404 N.Y.S. 2d. 565, 375 N.E. 2d. 745 (1978).

departments and public authorities to include provisions obligating private contractors seeking or holding state contracts to establish affirmative action programs. New York already had anti-discrimination statutes. The Court held that gubernatorial executive orders may not extend or expand the requirements of statutes in the name of enforcing them.¹

Ohio. In 1973, the Attorney General of Ohio advised the Governor that he could not adopt energy conservation emergency regulations fixing the speed limit on highways at less than the statutory limit therefor, in the absence of statutory authority to do so.²

Oklahoma. In 1945-46, the Oklahoma Supreme Court sustained the constitutionality of a state statute which created an emergency contingency fund to be used for specified emergency purposes, and authorized the governor to make transfers and expenditures therefrom for the purposes so specified. At the time, the governor used executive orders in directing these transactions.³ More recently, the Attorney General has held that the governor does not have inherent authority to create governmental entities by executive order, with executive functions, except as provided by law.⁴

Pennsylvania. In 1975, the Commonwealth Court of Pennsylvania was called upon, for the first time, to pass upon the authority of the governor to issue executive orders, and to adjudicate their status. At issue was a gubernatorial executive order of 1971 "requesting" personnel of the executive branch of the state government to file certain financial disclosure statements, which were to be kept confidential. Plaintiffs wished to inspect these statements, under the Right to Know Act of 1957.⁵ In its landmark opinion, now cited in the case law of other states, the Court noted that —

The intriguing question concerning the legal status of a Governor's executive order is a question of first impression. We start with the proposition that the Governor has that power which has been delegated to him by the Constitution and statutory provisions, or which may be implied properly from the nature of the duties imposed upon the Governor.

1. *In the Matter of Fullilove v. Carey*, 62 A.D. 2d. 798, 406 N.Y.S. 2d. 888 (1978); 48 N.Y. 2d. 826 (1979).

2. *Opinion of the Attorney General*, No. 73-120 (1973) (Ohio).

3. *Wells v. Childers*, 165 P. 2d. 358 (1945); *Holt v. Childers*, 168 P. 2d. 890 (1946).

4. *Opinion of the Attorney General*, No. 73-107 (1973) (Okla.).

5. P.L. 90 of 1957; 65 P.S. ss. 66.1 *et seq.*

Our research discloses that there are three types of executive orders.

The first type includes formal, ceremonial and political orders, which are usually issued as proclamations. The usual purpose of a proclamation is to declare some special day or week in honor of or in commemoration of some special thing or event. It is issued to make the public aware of the commemoration and usually has no legal effect. For example, if, upon the passing of a President of the United States, the Governor, by executive order, would direct that all flags be flown at half-mast for a period of time, his order could not be enforced unless there was some constitutional or statutory provision authorizing such an order. If, however, the Governor ordered the closing of all governmental offices during the day of the funeral of a deceased President, obviously this could affect legal rights, such as the filing of an appeal within the time required by statute.

The second class of executive orders is intended for communication with subordinate officials in the nature of requests or suggested directions for the execution of the duties of the Executive Branch of government. Like the first classification, this class is not legally enforceable, and the Governor could not seek a court order to enforce his executive order. The executive order would carry only the implication of a penalty for noncompliance, such as a possible removal from office, an official demotion, restrictions on responsibilities, a reprimand, or a loss of favor.

The third classification includes those executive orders which serve to implement or supplement the Constitution or statutes. These executive orders have the force of law... (The)... Governor could obtain a court order and the sanctions of noncompliance with a court order to enforce the executive order. The distinction between this third classification and the second classification is based upon the presence of some constitutional or statutory provision, which authorizes the executive order either specifically or by way of necessary implication.

In no event, however, may any executive order be contrary to any constitutional or statutory provisions, nor may it reverse, countermand, interfere with, or be contrary to any final decision or order of any court. The Governor's power is to execute the laws and not to create or interpret them. The Legislative Branch of government creates laws, and the Judicial Branch interprets them . . . It is clear to us that the Executive Branch, through executive orders, is not permitted under our system of government to usurp the judicial prerogative to interpret constitutional or statutory provisions. If such power was granted, those interpretations would be subject to change at least every four years, and the law would be filled with uncertainty. Furthermore, the only legal enforcement procedure available to the Executive Branch of government is through the Judicial Branch.¹

Adjudging the executive order at issue to be of the "second classification" above, the Court held that it did not fall within the reach of the Right to Know Act, since the financial disclosure statements were "personal communications to the Governor."

In the following year, this same Court upheld a gubernatorial executive order barring discrimination by state executive branch agencies on the grounds of sexual preferences, as a matter of executive branch policy. The Court declared that the propriety of a broad general policy statement contained in a gubernatorial executive order is not subject to judicial review or interference, where no crime has been committed, as this would contravene the Separation of Powers Doctrine. The Court observed that impeachment proceedings in the Legislature were the only recourse for those who believed that the governor had been guilty of "misbehavior in office."²

Texas. In another discrimination controversy, the Texas Supreme Court rules in 1944 that the Governor then had no power to issue an executive proclamation forbidding discrimination against Mexicans, designed to implement a concurrent resolution of the Legislature.³

West Virginia. The Supreme Court of West Virginia, in four decisions, has held: (a) that the governor may not issue executive orders which apply to state agencies other than those under this control, as

1. *Shapp v. Butera*, 22 Pa. Comm. Court 229, 234-36 (1975).

2. *Robinson v. Shapp*, 23 Pa. Comm. Court 153 (1976).

3. *Terrell Swimming Pools v. Rodriguez*, 182 S.W. 2d. 824 (1944).

this would violate the separation of powers provision of the state constitution;¹ (b) that a succeeding governor may not nullify an executive order of a previous governor which placed positions in the classified state service, pursuant to statute;² (c) that a governor may, by executive order, authorize the collection of state taxes contrary to statutory exemptions which have been declared unconstitutional;³ and (d) that in periods of extreme damage to the state and its people, the governor may, by executive order, suspend constitutional guarantees if the need for that action is sufficiently great.⁴

Wisconsin. More cautiously, the Wisconsin Supreme Court has ruled that in exercising his powers under an emergency powers act, the governor may not set aside another law simply because he believes that his action is within the spirit of the emergency powers statute aforesaid.⁵ The governor may not repeal statutes by executive order, given the requirements of the Wisconsin Constitution.⁶ Furthermore, when emergency powers are delegated to the governor by the legislature, the governor is judged judicially to have only those "legislative" or delegated powers which the enabling statute specifically addresses.⁷

CHAPTER VIII. EXECUTIVE ORDERS OF THE PRESIDENT OF THE UNITED STATES

Constitutional and Historical Background

Constitutional Background

The Federal Constitution, as interpreted by the United States Supreme Court, and reinforced by political tradition, favors an activist President, responsible for initiating policies and proposed legislation, and combining the roles of chief of state and prime minister. He is thus an executive of considerable substance.

The Federal Constitution does not contain a separation of powers article of the sort found in state constitutions. However, that principle is embodied in provisions reserving for, or assigning to, each of the three branches of the Federal Government specific powers and func-

1. *W. Va. Board of Education v. Miller*, 153 W. Va. 414 (1969).

2. *Karnes v. Dedisman*, 153 W. Va. 771 (1970).

3. *State ex rel. Miller v. Buchanan*, 24 W. Va. 362 (1884).

4. *State ex rel. Mays v. Brown*, 71 W. Va. 519 (1912).

5. *Ekern v. McGovern*, 154 Wis. 157 (1913).

6. *Ibid.*

7. *American Brass Co. v. State Board of Health*, 235 Wis. 440 (1944).

tions. The Supreme Court has further refined the separation of powers doctrine *via* judicial case law.

The Federal Constitution makes no mention of executive orders. The President's power to promulgate presidential executive orders, hereinafter referred to as "PEOs," is derived from two different sources: his independent powers under the Constitution, and statutes enacted by the Congress. A given PEO may be based on one or the other, or both types, of such authority. The latter is true where the President and Congress share jurisdiction over given functions and subjects under "shared powers" provisions of the Constitution.

Independent Presidential Powers. The Federal Constitution states that "The executive power shall be vested in a President of the United States of America," but does not designate him as "chief executive" or "supreme executive magistrate" as governors are in state constitutions.¹

The President cannot, therefore, cite constitutional language of the latter type as the basis of his authority to issue PEOs. Some Presidents have taken a narrow view of their "executive power," holding it to go little beyond the exercise of powers specifically assigned to them by the Constitution and federal statutes. However, over the years, especially in modern times, Presidents have more commonly construed the "executive power" vested in them to include an independent constitutional "stewardship" mandate to act to meet the needs of the nation unless that action is clearly forbidden by the Constitution or by enactments of the Congress.

The Constitution further provides that the President "shall take care that the laws be faithfully executed."² In this connection, and in the exercise of his other powers, he has a constitutional right to "require the Opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the Duties of their respective Offices."³ The Supreme Court has held that in enforcing the Constitution and federal laws, the President may exercise far-reaching power absent specific limitations imposed by Congress. When the President acts under powers expressly granted to him by the Constitution, the courts give him wide latitude, especially in emergency situations, subject to applicable restraints of the Bill of Rights. Executive orders may

1. U.S. Const. Art. II, s. 1, para. 1.

2. *Ibid.*, Art. II, s. 3.

3. *Ibid.*, Art. II, s. 2, para. 2.

be issued in the furtherance of the execution of his duties under his specific and implied powers under the Constitution, without prior congressional authorization. Thus, the President may issue PEOs requiring inter-agency cooperation and coordination, and the input of various federal agencies in the formulation of budget requests, Administration policies and federal regulations.

The President has broad implied powers in his constitutional role as the "Commander-in-Chief of the Army and Navy of the United States of America, and of the militia of the several States, when called into the actual service of the United States."¹ Judicially, his power in this area has been held to extend not only to control of the military establishment, but also to the economy and all aspects of domestic public safety in wartime.

The Constitution grants wide authority to the President in the field of foreign affairs. With Senate approval, he may make treaties with foreign states and appoint diplomatic personnel.² He is authorized to "receive Ambassadors and other public Ministers,"³ which gives him unilateral authority to recognize foreign governments. In general, the Supreme Court has recognized the President as the sole organ of the Federal Government in the field of international relations, as a traditional matter, save for the Senate's powers *re* the approval of treaties and certain appointments, and the power to declare war retained by Congress. The Court has held that the President may conclude "executive agreements" with foreign states in the absence of congressional authorization, upon the contention that such an "agreement" is an "international compact" and not a "treaty." Such "executive agreements" are often concluded under prior enabling acts of Congress, however.

The President's war powers and foreign relations powers have been construed to give him far more authority to issue PEOs in those subject areas, than other powers conferred upon him by the Constitution.

Statutory Powers of President. Numerous federal statutes specifically authorize the President to implement their policies and provisions through the issuance of regulations, proclamations and PEOs.

Such delegations of "legislative power" by the Congress take both explicit and implied forms. In its explicit form, that power is expressly

1. *Ibid.*, Art. II, s. 2.

2. *Ibid.*

3. U.S. Const., Art. III, s. 3.

delegated by statute. The United States Supreme Court has held that when the President is exercising authority delegated to him by statute, he is merely acting as the agent of the Congress; and the Court has indicated that Congress need only state the purposes which it seeks to accomplish in the delegatory statute. Further, such a delegatory statute must either (a) include standards which are sufficiently exact to enable those affected to understand the limits of the power delegated, or in lieu of such standards, (b) contain procedural safeguards adequate to prevent arbitrary and capricious uses of the authority delegated.

The historical "broad construction" doctrine adhered to by the United States Supreme Court in interpreting the Federal Constitution has long favored the capacity of government to act in meeting the needs of the nation and its people. In contrast, state courts tend to be more conservative in construing the constitutional authority of the state executive branch and other elements of state and local government.

Hence, in delegating authority to the President, it has been held, judicially, that it is sufficient for Congress to legislate as far, and as practicable, as necessity warrants, while leaving the details to be worked out by the President and executive branch agencies. The Court has drawn no clear boundary line beyond which a delegation of power by the Congress to the President would do violence to the separation of powers by enabling him to be a lawmaker as well as a law-administrator.

The Court has also indicated that, in certain situations, the President may issue regulations, proclamations and PEOs under an implied delegation of power by Congress. A long-continued practice of Presidents in acting on certain matters without specific statutory authorization, coupled with the acquiescence of Congress, raises the presumption of Congressional consent to such Presidential actions, and Congressional recognition of such actions as fully within the administrative power of the President. This presumption lasts until Congress asserts its legislative prerogative to regulate or prohibit those Presidential actions.

Historical Background¹

Presidents have been issuing "executive orders," or proclamations or other directives with the characteristics and legal effects of PEOs, since George Washington took office in 1789.

1. Source in part: Hebe, William, "Executive Orders in the Development of Presidential Power", *Villanova Law Review*, Vol. XVII, 1972, School of Law, Villanova University Villanova, Pa., pp. 688-712.

Prior to the New Deal, the peacetime uses of PEOs were largely limited to matters relative to (a) the management of federal lands, (b) the administration of federal public works (such as shore protection, lighthouses, etc.), (c) the administration of the diplomatic and consular services, (d) the customs service, (e) the appointment and removal of executive branch personnel, (f) the civil service (after passage of the Pendleton Civil Service Reform Act in 1883), (g) the allocation of funds under general appropriation acts (where authorized by the statutes), (h) the armed forces, and (i) ceremonial occasions and holidays.

More extensive use was made in wartime of PEOs in connection with the President's war powers. President Abraham Lincoln made sweeping use of his war powers, during the Civil War, to issue PEOs and proclamations freeing the slaves in the Confederate States, suspending the writ of habeas corpus, authorizing the trial of civilians in military courts, and providing for a blockade of Confederate ports. PEOs were issued during World War I, under the President's war powers and Congressional acts, in respect to military operations and the economy.

PEOs were used by the McKinley Administration and its successors to provide for the administration of the affairs of Hawaii, Guam, the Philippines and the Panama Canal Zone.

With the advent of the New Deal, the use of PEOs was greatly expanded to cope with the economic and social problems posed by the Great Depression, and with the exigencies of World War II. The multiplication of PEOs on all manner of subjects paralleled the burgeoning of federal regulatory agencies and the proliferation of federal programs. This trend continued after World War II, as the nation passed through the Korean and Vietnam conflicts, the Arab Oil Boycott, and the economic and social programs of Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford and Carter. PEOs and Presidential proclamations now form part of the massive Code of Federal Regulations subject to the Federal Register Act of 1935.¹

Currently, the number of PEOs in the numbered series totals approximately 12,200, many of which have lapsed or have been repealed, while others amend other PEOs. In addition is an unknown number of pre-1933 PEOs which are unnumbered, and which still remain in effect, most of them filed with the Defense Department and its component Navy and War Departments, and the Department of the Interior.

1. Now 44 U.S.C. ss. 1501 H.

The vast majority of numbered and unnumbered PEOs pertain to routine administrative matters of the executive branch.

Until the 1920's, little was done to standardize the issuance of PEOs. They were not numbered in sequence. Many were filed with the State Department as the archives agency; but a great many more were filed only with the federal agencies charged with carrying out their provisions. In 1907, the State Department arranged in order the PEOs which had been filed with it since 1862 and assigned numbers to them accordingly in sequence, starting with the PEO of Abraham Lincoln authorizing the establishment of a provisional court for that part of Louisiana occupied by Union forces. Until 1933, this numbering system omitted numerous documents, variously entitled, which had the characteristics and legal effects of PEOs, but were not so called.

Initial efforts to standardize the procedures for issuing PEOs were made by President Harding (1921-23) with his Executive Order No. 3577, and by President Hoover with his Executive Orders Nos. 5220 of 1929 and 5658 of 1931. These PEOs on PEOs and Presidential proclamations deal largely with matters of style. More extensive requirements were ordained by President Roosevelt in his Executive Orders Nos. 6247 of 1933 and 7298 of 1936, which mandated review of proposed PEOs by the Attorney General. President Truman's Executive Order No. 10006 of 1948 regulated the preparation, presentation, filing and publication of PEOs. The procedures for formulating, processing and issuing PEOs were fully overhauled by President Kennedy's Executive Order No. 11030 of July 19, 1962, which, with minor subsequent amendment by Presidents Johnson (Executive Order No. 11354 of 1967) and Carter (Executive Order No. 12080 of 1978), comprises the basis of PEO procedures today. These PEO requirements have been recodified as part of the Code of Federal Regulations.¹

Judicial Treatment of PEOs

As noted earlier, the federal courts have given wide latitude to Congress to delegate regulatory and other powers. Similarly, they have been disposed to uphold PEOs, upon the premise that the Federal Government must be able to act. Moreover, as the United States Supreme Court has been prone to claim sweeping authority for itself through the institution of judicial review, it has been inclined to be

1. *Code of Federal Regulations*, Part 19, ss. 19.1-19.6 (1 CFR 19.1-19.6).

generous in continuing the powers of the other two branches of the Federal Government to function within their respective domains.

The case law on PEOs is not very great compared to other subjects dealt with by the courts. In general, the accepted doctrine is that where Congress has enacted a law, it must be followed in the formulation of PEOs, proclamations, or administrative regulations authorized by that law. The President may not issue PEOs reassigning functions and powers vested by law in one specified officer or agency to another officer or agency without either obtaining a statutory amendment or following statutorily-authorized reorganization plan procedures. With certain exceptions, the President may not issue PEOs requiring the general public or some portion thereof outside the federal establishment to do anything, in the absence of an enabling constitutional or statutory provision authorizing that action. PEOs cannot be used to define felonies or to impose fines and other penalties without a statutory basis. As long as the President functions within these general guidelines, he is acting properly.

On a few occasions, the United States Supreme Court has invalidated PEOs in whole or in part.

In the famous Civil War case of *Ex Parte Milligan* in 1866,¹ the Court invalidated the trial of a civilian by a military court in Indiana under a statute authorizing the President to suspend habeas corpus during the "Rebellion." A PEO had been issued by him under that law. The Court held that civilians could be tried only in civil courts in areas where the operations of those courts were not actually impaired by hostile military action.

In 1952, the Supreme Court struck down President Truman's Executive Order No. 10340 which ordered the Secretary of Commerce to seize and operate certain steel mills, in order to head off a strike. The President had argued that his action was an exercise of his war powers and of his duty to take care that the laws were enforced; he cited no statutory authorization for this action. This "inherent powers" claim was rejected by the Court, which held that property could not be so taken to settle a labor dispute without Congressional authorization. The Court cited the refusal of Congress to enact such enabling statutes at the time as grounds for its conclusions.²

1. 71 U.S. 2 (1866).

2. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

In 1956, the Court invalidated a PEO relative to loyalty requirements for federal employees, on the grounds that it failed to comply with the statute under which it was issued.¹

PEO Procedure

PEO procedures are controlled by Part 19 of the *Code of Federal Regulations* incorporating President Kennedy's Executive Order No. 11030 of 1962 (as amended). Its text is reprinted in full in Appendix B of this report.

Initiation of PEOs

A proposed PEO may originate in the White House itself, or in one of the federal departments and agencies. Those emanating directly from the White House are likely to reflect important political decisions made by the President, and in such cases they have a major "public relations" impact. Proposed PEOs authored by federal departments and agencies very frequently involve the exercise of authority delegated to the President by acts of Congress and relate to the implementation of those statutes and presidential policies based thereon.

The proposed PEO must have a suitable title, and contain a citation of the authority under which it is to be issued. It must conform to the punctuation, capitalization, spelling and other requirements of style prescribed in the U.S. Government Printing Office Style Manual, and conform to the decisions of the Board of Geographic Names in respect to the spelling of geographical names. When the PEO deals with tracts of land, its descriptions thereof must conform as nearly as practicable to standards prescribed by the Bureau of Land Management in the Department of the Interior. The proposed PEO must be typed double-spaced (except for tables, quotes and land descriptions) on 8" x 13" pages.

Processing by Office of Management and Budget

The proposed PEO with seven copies thereof must be transmitted by the initiating officer or agency to the Director of the Office of Management and Budget (OMB). It must be accompanied by a letter explaining the nature, purposes, background and effect of the proposed PEO,

1. *Cole v. Young*, 351 U.S. 536 (1956).

and its relationship, if any, to any pertinent statutes and other PEOs and proclamations.

The OMB then checks the proposed PEO for (a) compliance with Administration policies, (b) its budgetary and fiscal impact, if any, and (c) any problems likely to arise in its practical administration and implementation. If the proposed PEO is submitted by the White House, it is checked only as to the latter two considerations, the assumption being that policy issues have already been resolved in any PEO received from the White House. The OMB is watchful for any PEO features which may generate excessive red tape or prove impossible to administer. The OMB also checks for adherence to the requirements of Executive Order No. 11030.

The OMB then circulates the proposed PEO to all federal agencies having an interest in its policies or administration, for their comments. If one or more of these agencies object to the proposed PEO, or have criticisms or suggested changes, the OMB tries to resolve those issues, and to achieve a meeting of the minds among these interested parties. In such a case, the OMB then redrafts the proposed PEO.

Normally, the OMB does not regularly require the officer or agency proposing a PEO to submit a fiscal note or financial impact statement. Such fiscal information is requested by the OMB only if it wants the same in a particular instance. Sometimes, fiscal data will be requested as a political move, in order to permit the OMB to disapprove the proposed PEO on cost grounds, thereby taking some pressure group off the back of the Administration or the initiating agency. Or, the OMB may be genuinely concerned about the potential cost of the proposed PEO to the Treasury, or its inconsistency with Administration budgetary or fiscal policy; in such an event, the OMB acts to protect the Administration.

Some proposed PEOs are not necessary, in the sense that they merely repeat the substance of earlier PEOs or cover subject matter adequately set forth in federal statutes. "Repetitious" PEOs of this type may reflect the fact that an agency or agencies already clearly charged with certain duties may not be performing the same. The PEO is intended to nudge the agency or agencies concerned into action, and to respond to public demands for action, thereby serving a "PR" need.

If the Director of the OMB approves a proposed PEO, or a revised version thereof, he must transmit it to the Attorney General for consid-

eration as to form and legality. If the Director or the Attorney General reject a proposed PEO, it may not be presented to the President unless it is accompanied by a statement of the reasons for that rejection.

Processing by Department of Justice

Under authority vested in him by Executive Order No. 11030 the Attorney General has assigned the task of reviewing proposed PEOs to the Office of Legal Counsel (OLC) of the United States Department of Justice.

It is the practice of the OLC to confine its review of such PEOs to legal aspects, and not to get into the policy domain. Hence, the OLC has declined to assist operating agencies, the OMB or others in the formulation of PEOs. The latter task is left to the agency requesting the PEO, and federal agencies, as a rule, have very competent legal staff of their own. The Department of Justice thus remains aloof from proposed PEOs until they have cleared the OMB and are before the OLC for legal scrutiny. This permits the OLC to remain free of any commitments, direct or indirect, to justify the PEO sought, as might be the case if it had participated in the initial drafting. The Justice Department visualizes its function as that of counsel to the President, with a duty to protect him and his Administration from embarrassment by court challenges that might succeed. Traditionally, Presidents have declined to approve proposed PEOs which the Department of Justice has found legally defective.

After scrutinizing a PEO received from the OMB, the OLC prepares an inter-agency memorandum as to the legality of the proposed PEO. This memorandum is circulated to the OMB, the agency which requested the PEO, and the President. If the OLC determines that the proposed PEO is defective legally, the PEO is returned to the OMB for consultation with the agencies concerned, and, if possible, correction of its legal deficiencies. If the OMB or the originating agency insists upon the PEO, the OLC prepares a memorandum to the President citing its legal objections which, as indicated above, are usually respected by the President.

A large number of proposed PEOs merely delegate authority already given to the President by statute. The OLC checks to determine whether the statutory procedures prescribed for the exercise of such

delegated power have been complied with, and whether Congress has restricted the President's authority to delegate power under the enabling statute.

Other proposed PEOs involve the exercise by the President of a policy initiative which he wants one or more federal agencies to follow. In such cases, the OLC must determine whether the proposed PEO would apply improperly to independent agencies. In addition, the PEO must be checked to be sure that it does not improperly divest any officer or agency of powers assigned by statute.

Various statutes authorize the President to implement their provisions and policies through the issuance of PEOs. Most such PEOs relate to civil service, foreign trade and energy. A proposed PEO of this type is evaluated by the OLC to determine whether the PEO goes beyond the scope of the Congressional mandate.

One of the most difficult of the unresolved legal questions which the OLC has to contend with is the extent to which the President may interpose himself into the regulatory process. In such an event, the voluminous, detailed laws which describe the powers, duties, activities and procedures of federal regulatory agencies must be examined.

Subsequent Processing

When the OLC approves a PEO, it transmits the same to the Director of the Office of the Federal Register, National Archives and Records Service, in the General Services Administration. That Director checks the PEO for conformity with style requirements, and then transmits it (with three copies) to the President. When the PEO is signed by the President, it is returned to the Office of the Federal Register for publication in the federal register. In urgent situations, the OLC may eliminate this process by sending the PEO directly to the President.

Proclamations

Executive Order No. 11030 mandates procedures for the processing of Presidential proclamations which, with minor variations, are essentially the same as those followed *re* PEOs. These procedures do not apply to proclamations of treaties and other international agreements.

Presidential proclamations fall into three general categories: (a) those dealing with ceremonial matters, (b) those calling for the observ-

ance of special days or events, and (c) those with a legal impact issued under statutory authority. Presidential proclamations of the last-named type have the features of PEOs and, in some cases, are indistinguishable from PEOs; most commonly, they deal with martial law, civil defense, foreign trade and treaty provisions; and their function is to trigger the operation of particular statutes which are dormant until so activated. A problem arises for the OLC when a Presidential proclamation, or document purporting to be such, is actually a PEO and thus subject to procedures governing PEOs.

Attorney General Opinion of 1961

In 1961, President Kennedy issued his Executive Order No. 10925 requiring the inclusion in federal contracts of a clause forbidding contractors to discriminate in their employment practices on the grounds of race, color, religion or national origin. This PEO imposed sanctions for noncompliance as a valid exercise of Presidential authority.

When this PEO was questioned, the Attorney General ruled that the PEO was a legal exercise of the power of the Federal Government to fix the terms and conditions under which it will purchase services and supplies; and that the PEO implemented and effectuated the policy of the Federal Government opposing the use of governmental contracts to foster discrimination. The Attorney General found that this PEO, formulated by the President's Committee on Equal Employment Opportunity, contained adequate procedural protection for contractors and other persons covered by its nondiscrimination clauses.¹

Congressional Oversight

A few of the statutes authorizing PEOs provide for a "Congressional veto" of PEOs issued under their provisions. The PEO may require positive Congressional action by a resolution; or it may be nullified by a resolution of either or both houses. A Congressional veto exists in the case of gas rationing and certain trade pact arrangements. OMB officials express doubt as to the constitutionality of some of these "Congressional veto" provisions.

For the most part, according to OMB representatives, Congress does not care to involve itself with PEOs, and hence it has provided for

1. *Opinions of the Attorney General of the United States*, Vol. 42 (1961-71), pp. 97-126, Sept. 26, 1967.

no systematic legislative oversight of PEOs. With so many regulations and PEOs being issued annually, Congress would otherwise be hard pressed in meeting its primary responsibilities.

Congress prefers, instead, to delegate the authority to issue PEOs and agency regulations, to define the purposes for which the same may be so delegated, and leaves the details of implementation to the President and the federal bureaucracy. If complaints surface, Congress may ask for information about the PEO or regulations at issue, and seek to remedy the complaints by amending the enabling law, if need be. Beyond this, parties aggrieved by PEOs may appeal to the courts.

Problems may arise if the PEO enabling law is vague. Litigation can result in such cases. Normally, the courts will uphold the Administration unless some significant abuse of power is shown. In general, the Federal Government has lost few PEO cases to date.

No one has been anxious to force a judicial or statutory definition of the boundary line between the legislative and executive powers in regard to PEOs. The dimension of Congressional authority on this score is uncertain; and PEOs are a convenient device, legally, administratively and politically, from the viewpoints of both Congress and the President. If a PEO concerns policy or administrative practices, it is totally within the President's realm.

APPENDIX A

Index of Massachusetts Gubernatorial Executive Orders, 1941-80

The following index lists, in numerical order, the executive orders issued by the Governors of Massachusetts since 1941. In terms of the numbers given to them, there were two series of such orders, herein designated as the "Old Number Series" of 1941-49, numbered consecutively from Executive Order No. 1 to Executive Order No. 99, and the current "New Number Series" initiated in 1950, which began again with an Executive Order No. 1 and which has been numbered consecutively since then. In the following index, there are used the abbreviations set forth below with the meanings indicated:

- CDA — The Massachusetts Civil Defense Act (Acts of 1950, c. 639, as amended to date).
- CL — The Governor cited "the authority vested in me by the Constitution and laws of the Commonwealth," or words to that effect, without citing specific constitutional or statutory provisions.
- EO — Massachusetts gubernatorial executive orders.
- NC — Executive order contains no citation of the authority under which it was promulgated.
- PEO — U.S. presidential executive order.
- P.L. — U.S. Public Law.
- SEM — The Governor cited his "authority as Supreme Executive Magistrate" under the Massachusetts Constitution (specifically or implicitly referring to Part II, c. II, s. I, Art. I).
- WPA — Massachusetts War Powers and Defense Acts of World War II (Acts of 1941, c. 719, and/or Acts of 1942, c. 13, both as amended).

Part I. Old Number Series, 1941-49

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
1	1941	Creating a state and local civil defense organization, and defining its functions.	WPA
2	1941	Transfer of Division of Employment Security to federal control.	"
3	1941	Air raid and blackout regulations.	"
4	1942	Vendors' permits to buy and sell used motor vehicles; waiver of certain statutory and regulatory restrictions.	"
5	1942	Transportation of war materials; waiver of certain statutory restrictions.	"
6	1942	Same subject; waiver of Blue Law restrictions.	"
7	1942	Labor on Sundays and legal holidays	"
8	1942	Establishing a 40 m.p.h. speed limit on public ways; penalties for violations.	"
9	1942	Pay increases for State Farm (Bridgewater) personnel.	"
10	1942	Practice blackouts and air raid drills.	"
11	1942	Wartime public mass transportation and taxi services.	"
12	1942	Permits for reduction to scrap of motor vehicles.	"
13	1942	Wartime use of state pier in Bourne.	"
14	1942	Closing of public ways to public use on request of Federal Government.	"
15	1942	Establishing police mobilization regions and organizations; functions defined.	"
16	1942	Sale of scrap metal for war efforts; permits expedited; restrictions of conflicting laws and town by-laws waived.	"

Part I. — (con'd)

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
17	1942	Permitting the Metropolitan District Commission to supply water to certain industrial plants in Lynn; certain statutes waived.	WPA
18	1942	Authorizing State Commissioner of Insurance to issue licenses to insurers to participate in Federal War Department Insurance Rating Plan; certain statutory restrictions waived.	"
19	1942	Suspending statutory and regulatory limits on motor vehicle and trailer weights, lengths and heights.	"
20	1942	Authorizing non-resident armed forces chaplains to solemnize weddings of armed forces personnel.	WPA and G.L. c. 207, s. 39
21	1942	Authorizing auto pools by commuting employees; certain statutory restrictions waived.	WPA
22	1942	Establishing five mobilization regions and organizations; functions defined.	"
23	1942	Regulating banking operations during wartime; certain statutory restrictions waived.	"
24	1942	Authorizing the Metropolitan District Commission to provide sewerage disposal service to Bethlehem-Hingham Shipyard in Hingham.	"
25	1942	Use of prison labor in war effort; certain statutory restrictions waived.	"
26	1942	Disclosure of information by Division of Employment Security; certain statutory restrictions waived.	"

Part I. — (con'd)

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
27	1942	Suspending certain statutory and local restrictions <i>re</i> local government purchases of fuel.	WPA
28	1942	Authorizing the Federal War Damage Corporation to do insurance business in the state; certain statutory and regulatory restrictions modified or waived.	"
29	1942	Same subject; state purchase of such federal insurance authorized.	"
30	1942	Civil defense system; emergency food and shelter arrangements; medical services.	"
31	1942	Blackout regulations in coastal and island areas.	"
32	1942	Eligibility of military dependents for local welfare assistance.	WPA and G.L. c. 116, s. 1
33	1942	Authorizing appointment to Industrial Accident Board of persons to replace temporarily Board member absent on military service.	WPA
34	1942	Authorizing certain highway and bridge construction by the Department of Public Works in aid of the war effort; landtakings authorized.	"
35	1942	Lowering highway speed limit to 35 m.p.h.; EO No. 8 amended.	"
36	1942	Suspending certain statutory restrictions on employment of minors aged 14 or more in harvesting.	"
37	1942	Authorizing certain motor vehicle insurance refunds to motor vehicle owners; certain statutory restrictions waived.	"

Part I. — (con'd)

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
38	1942	Welfare assistance to certain restricted or detained enemy aliens and their families.	WPA
39	1942	Registration and insurance of motor vehicles and trailers used in war effort.	"
40	1942	Blackout regulations; EO No. 31 revoked; penalties; contrary state and local laws and regulations suspended.	"
41	1942	Authorizing appointment to Industrial Accident Board of person to replace temporarily Board member absent on military service.	"
42	1942	Regulating hours of business of state agencies.	"
43	1942	Authorizing the Metropolitan District Commission to sell water to certain war industries and to extend its mains for that purpose.	"
44	1942	Federal income tax withholding <i>re</i> state and local government employees.	"
45	1942	Emergency measures <i>re</i> fuel shortage caused by war.	"
46	1943	Regulation of fuel sales and distribution; penalties for violations.	"
47	1943	Establishing day nursery program for children of female employees of war industries; administration of federal aid therefor.	"
48	1943	Authorizing auto pools by commuting employees and others; scope of EO No. 21 expanded.	"
49	1943	Suspending certain statutory restrictions on purchases by local governments of heating systems.	"

Part I. — (con'd)

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
50	1943	Civil defense and emergency regulations for hospitals and hospital service.	WPA
51	1943	Heating of State House.	"
52	1943	Blackout regulations; EO Nos. 3 and 10 revoked.	"
53	1943	Storage of inflammable and explosive materials required for war effort.	"
54	1943	Establishing programs <i>re</i> (1) evacuation and emergency welfare aid, (2) civilian war assistance; EO No. 30 revoked.	"
55	1943	Blackout regulations; EO No. 40 revoked; penalties.	"
56	1943	Authorizing operation of certain test motor vehicles in excess of 35 m.p.h. speed limit.	"
57	1943	Federal income tax withholding procedures <i>re</i> state and local government employees; EO No. 44 amended.	"
58	1943	Allowing persons aged more than 30 to enlist in State Police if otherwise qualified; statutory limit suspended.	"
59	1943	Allowing persons aged 17 to join State Guard; statutory minimum age of 18 suspended.	"
60	1943	Authorizing Worcester manufacturer of medical supplies to build overhead bridge over road.	"
61	1943	Authorizing Cambridge wire manufacturing company to build overhead bridge over road.	"
62	1943	Use of prison labor in war effort; EO No. 25 amended.	"

Part I. — (con'd)

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
63	1943	Blackout regulations; EO No. 55 amended; 30 m.p.h. speed limit in blacked-out areas.	WPA
64	1943	Transportation of scrap materials required for war effort.	"
65	1943	Allowing Salem manufacturer of electrical equipment to build overhead bridge over road.	"
66	1944	Replacement of lost or mutilated motor vehicle number plates.	"
67	1944	Registration of medical students as assistants in medicine; certain statutory requirements suspended.	"
68	1944	Open-air burning for agricultural purposes.	"
69	1944	Implementing federal requirements <i>re</i> manufacture and repair of hot water tanks.	"
70	1944	Renewal of motor vehicle licenses of armed forces personnel.	"
71	1944	Purchase of federal war supplies by state and its subdivisions; certain statutory requirements <i>re</i> bid notices, etc., suspended.	"
72	1944	Issuance of plates by Department of Public Utilities to commercial carriers operating leased vehicles.	"
73	1944	Designating Board of Collegiate Authority as agent of state for certain purposes under P.L. 78-346 federal veterans educational aid program.	"

Part I. — (con'd)

Governor Leverett Saltonstall, 1939-45

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
74	1944	Participation of Massachusetts banks in federal loan guaranty program for veterans under P.L. 78-346.	WPA
75	1944	Federal income tax withholding procedures <i>re</i> state and local government employees.	"

Governor Maurice J. Tobin, 1945-47

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
76	1945	Wartime mass transportation; EO No. 11 amended.	WPA
77	1945	EO No. 8 <i>re</i> highway speed limit revoked.	"
78	1945	Implementing federal loan guaranty program for reconversion of businesses to peacetime production.	"
79	1945	State take-over of strike-ridden Massachusetts Street Railway Company.	"
80	1945	EO No. 79 revoked.	"
81	1945	Business hours of state agencies; EO No. 42 amended.	"
82	1945	State participation in federal apprenticeship training program for returning veterans.	"
83	1945	Federal income tax withholding procedures <i>re</i> state and local government employees.	"
84	1945	Suspending maximum age ceiling (30 years) of State Police enlistees.	"
85	1945	Closing state offices on December 24, 1945.	WPA and G.L. c. 30, s. 24

Part I. — (con'd)

Governor Maurice J. Tobin, 1945-47

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
86	1945-	Revoking EO Nos. 1, 3, 6, 10, 12, 15, 16, 19, 22, 25, 27, 29, 31, 32, 40, 45, 46, 49, 50, 52, 53, 54 (Part I), 55, 56, 62, 63, 64, 68, 70, 71 and 74.	WPA
87	1946	Revoking EO No. 72.	"
88	1946	Bread supply shortage; certain laws suspended to permit increase in production and distribution of bread.	"
89	1946	Closing certain forests and woodlands to cope with fire hazard.	"
90	1946	Same subject.	"
91	1946	EO No. 90 revoked.	"
92	1946	EO No. 89 revoked.	"
93	1946	State system of rent control established in lieu of expiring federal rent control system.	"
94	1946	Restricting tenant evictions.	"
95	1946	EO Nos. 93 and 94 revoked.	"
96	1946	EO No. 72 revoked (for second time).	"
97	1946	Implementing P.L. 79-549 for return of local offices of U.S. Employment Service to state control (Division of Employment Security).	"

Governor Robert F. Bradford, 1947-49

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
98	1947	Revoking EO Nos. 2, 5, 9, 13, 14, 17, 18, 21, 23, 26, 28, 33, 36-39, 41, 42, 44, 47, 48, 51, 57-61, 65-67, 75, 78, 81, 84, 85, 88 and 97.	WPA
99	1947	Revoking EO Nos. 4, 7, 11, 20, 24, 34, 43, 54, 73, 76, 82 and 83.	"

Part II. New Number Series, 1950 On

Governor Paul A. Dever, 1949-53

<i>EO No.</i>	<i>Date</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
1	1950	Providing for establishment of local civil defense organizations.	CDA
2	1950	Same subject; state to appoint local civil defense director if municipality does not.	"
3	1950	Division of state into nine Civil defense regions; organization of State Civil Defense Agency.	"
4	1951	Civil defense medical services organization.	"
5	1951	Welfare services in civil defense emergencies.	"
6	1951	Organization and direction of police services in civil defense emergencies.	"
7	1951	Organization and direction of firefighting services in civil defense emergencies.	"
8	1951	Civil defense communications system.	"
9	1951	Civil defense air raid warnings; and Ground Observation Corps created under National Guard.	"
10	1951	Civil defense emergency rescue and evacuation system.	"
11	1951	Public utilities installations and services in civil defense emergencies.	"
12	1951	Division of Civil Defense Region 5 into five sectors.	"
13	1951	Authorizing armed forces chaplains to perform marriages where one party is member of the armed forces.	"
14	1951	Civil defense alert system established; alert system regulations re movement of persons and vehicles.	"

Part II. — (con'd)

Governor Paul A. Dever, 1949-53

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
15	1952	Banking operations during civil defense emergencies.	CDA
16	1952	Division of Civil Defense Regions into sectors; EO No. 12 amended.	"
17	1952	Travel by uniformed and civilian personnel of federal armed forces on public ways during civil defense alerts.	"
18	1952	Loans by banks and other financial institutions to Korean War veterans under P.L. 82-550.	"
19	1952	Educational benefits for Korean War Veterans.	"

Governor Christian A. Herter, 1953-57

<i>EO No.</i>	<i>Date</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
20	1953	Emergency housing for victims of Worcester Tornado of June 9, 1953.	CDA
21	1953	Authorizing State Treasurer to pay war bonuses to Korean War veterans from state treasury balances, pending sale of state bonds to finance same.	"
22	1954	Authorizing Sunday sales of perishable foodstuffs in hurricane emergency of August 31, 1954.	"
23	1954	Replacement of permits, certificates and licenses destroyed or lost in hurricane of August 31, 1954.	"
24	1954	Travel by authorized persons during civil defense alerts; EO No. 14 amended.	"
25	1955	Civil defense planning by state agencies; EO Nos. 3-8, 10 and 11 modified.	"

Part II. — (con'd)

Governor Christian A. Herter, 1953-57

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
26	1955	State civil defense structure reorganized; new areas and sectors established.	CDA
27	1955	Control of resources and property by State Civil Defense Agency in civil defense emergencies; emergency procurement; emergency regulations; authority of local civil defense organizations; revocation of EO Nos. 3-8, 10-12 and 16.	"
28	1955	Transfer of Ground Observation Corps to State Civil Defense Agency; cooperation with U.S. Air Force; EO No. 9 revoked.	"
29	1955	Emergency distribution of dry ice in flood and storm ravaged areas of Western Massachusetts.	"
30	1955	Replacement of permits, certificates and licenses destroyed or lost in Western Massachusetts floods.	"
31	1956	Civil defense evacuation procedures; care of refugees; civil defense alert system; EO Nos. 17 and 24 revoked.	"

Governor Foster Furcolo, 1957-61

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
32	1957	Authorizing State Civil Defense Agency to use rain-making technology to combat forest fire hazard; certain statutory powers of State Weather Amendment Board suspended.	CDA
33	1957	Same subject.	"
34	1958	Reorganizing areas and sectors of State Civil Defense System; EO No. 26 revoked.	"

Part II. — (con'd)

Governor Foster Furcolo, 1957-61

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
35	1960	Overtime compensation of personnel of state agencies.	G.L. c. 7, s. 28
36	1960	Placing employees of the state and local civil defense agencies (except directors) under the Civil Service Law and Rules.	CDA and P.L.
37	1960	Establishing 14 fire mobilization districts and civil defense firefighting system; EO Nos. 27 and 34 modified.	"

Governor John A. Volpe, 1961-63

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
38	1961	Civil Service Law status of state and local civil defense agency personnel; EO No. 36 amended.	CDA
39	1961	EO No. 36 revoked.	"
40	1961	Authorizing municipalities to contribute to cost of five mobilization district radio communications systems.	"
41	1961	Placing employees of the state and local civil defense agencies (except directors) under the Civil Service Law and Rules.	CDA; P.L. 85-606 PEO No. 10773 (1958).
42	1961	Same subject; EO No. 41 revoked.	"
43	1962	State take-over of strike-ridden Metropolitan Transit Authority.	NC
44	1962	Ending Metropolitan Transit Authority strike emergency; EO No. 43 revoked.	"

Part II. — (con'd)

Governor Endicott Peabody, 1963-65

<i>EO No.</i>	<i>Date</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
"42A"	1963	Amending EO No. 42 <i>re</i> civil service status of state and local civil defense agency personnel.	CDA
45	1963	Designating November 28, 1963 as Thanksgiving Day and special day in honor of the assassinated President John F. Kennedy.	NC
46	1964	Enlarging the powers and duties of the state and local civil defense agencies <i>re</i> civil defense planning, and the control and use of available resources in the event of enemy attack.	CDA

Governor John A. Volpe, 1965-69

<i>EO No.</i>	<i>Date</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
47	1965	Establishing an Executive Council for Value Analysis and Engineering, and a Committee on Value Analysis and Engineering, to aid the Division of Industrial Engineering, and defining their powers and duties.	G.L. c. 7.
48	1965	Establishing a Governor's Committee on Fund-Raising Within the State Service; regulation of such fund-raising activities of voluntary health, welfare and other entities.	NC
49	1966	Designating the State Department of Public Health as the state agency to regulate public and private health care institution services under Title XIX of the Social Security Act; designating the State Department of Public Welfare as the state agency to administer the state plan for medical assistance under that Title.	Federal Social Security Act, Title XIX, s. 1902

Part II. — (con'd)

Governor John A. Volpe, 1961-63

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
50	1966	Establishing the Vocational Rehabilitation Planning Commission to act as the state agency to carry out certain planning functions under the Vocational Rehabilitation Act of 1965 (P.L. 89-333), and defining its powers and duties.	P.L. 89-333
51	1966	Designating the State Division of the Blind as the state agency to administer Social Security Act Title X medical aid to the blind; EO No. 49 amended.	Federal Social Security Act, Title XIX, s. 1902
52	1966	Establishing an Advisory Committee on Architect Selection, and defining its powers and duties.	G.L. c. 7, s. 30B
53	1967	Establishing a Massachusetts Emergency Communications Commission within the State Civil Defense Agency, and defining its powers and duties.	CDA
54	1967	Establishing an Office of Emergency Controls within the State Civil Defense Agency, and defining its powers and duties.	"
55	1967	Establishing a Governor's Advisory Commission on Open Space and Outdoor Recreation, and defining its powers and duties.	NC
56	1968	Amending EO No. 47 <i>re</i> the Executive Council for Value Analysis and Engineering.	"
57	1968	Establishing a Governor's Advisory Council on Transportation, and defining its powers and duties.	"
58	1968	Establishing a Governor's Human Rights Task Force, and defining its powers and duties.	"

Part II. — (con'd)

Governor John A. Volpe, 1961-63

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
59	1968	Establishing a Massachusetts Commission on Ocean Management, and defining its powers and duties.	CDA
60	1968	Designating the Governor's Public Safety Committee as "state law enforcement planning agency" under Federal Omnibus Crime Control and Safe Streets Act of 1968; defining duties of that Committee; creating a Proposal Review Board with certain duties.	SEM
61	1968	Amending EO No. 60 immediately above.	"
62	1968	Establishing a governor's Commission on the Medical Examiner System, and defining its advisory and investigative powers and duties.	NC
63	1968	Establishing a Governor's Committee on the Domestic Fishing Industry, and defining its advisory powers and duties.	"
64	1968	Establishing a Governor's Advisory Committee on Food Administration, and defining its powers and duties.	"
65	1968	Establishing a Governor's Advisory Committee on the Domestic Fishing Industry; defining its power and duties; EO No. 63 revoked.	"
<i>Governor Francis W. Sargent, 1969-75</i>			
<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
66	1969	Establishing the Advisory Council on Vocational and Technical Education, and defining its powers and duties; designating same as state agency for the purposes of P.L. 90-576.	SEM and P.L. 90-576

Part II. — (con'd)

Governor Francis W. Sargent 1969-75

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
67	1969	Establishing a Governor's Advisory Council on Labor-Management Relations, and defining its powers and duties.	SEM
68	1969	Establishing a Governor's Advisory Committee On Child Development, and defining its powers and duties.	"
69	1969	Establishing a Governor's Task Force on Spanish-Speaking Americans, and defining its powers and duties.	"
70	1970	Further amending EO No. 60 <i>re</i> the Governor's Public Safety Committee.	"
71	1970	Establishing a Governor's Special Planning Commission on Elderly Affairs and the 1971 White House Conference on the Aging, and defining its powers and duties.	SEM
72	1970	Amending EO No. 57 <i>re</i> the Governor's Advisory Council on Transportation.	"
73	1970	Establishing a Youth Task Force on the Environment, and defining its powers and duties.	"
74	1970	Establishing a Governor's Code of Fair Practices; providing for an affirmative action program in state employment, the provision of state services, and the awarding of state contracts; requiring private educational institutions to have affirmative action programs; requiring businesses, health care facilities, and realtors licensed by the state to operate on a non-discriminatory basis; requiring affirmative action by local school committees; forbidding discrimination or segregation in public housing or publicly-assisted housing.	CL

Part II. — (con'd)

Governor Francis W. Sargent 1969-75

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
75	1970	Implementing "Right-to-Know" (Freedom of Information) Amendments to G.L. c. 66; providing for public access to state agency records not closed by law or executive order; authorizing the Commissioner of Administration to adopt regulations implementing this executive order.	SEM
76	1970	Establishing a Governor's Commission on Adoption and Foster Care, and defining its powers and duties.	"
77	1970	Establishing a Joint Correctional Planning Commission, and defining its powers and duties.	"
78	1971	Establishing a Drug Program Review Board, and defining its powers and duties.	"
79	1971	Amending EO No. 66 <i>re</i> Advisory Council on Vocational and Technical Education.	"
80	1971	Establishing a Governor's Commission of Boating Advisors, and defining its powers and duties.	"
81	1971	Establishing a Governor's Commission on the Status of Women, and defining its powers and duties.	"
82	1971	Further amending EO No. 57 <i>re</i> the Governor's Advisory Council on Transportation.	"
83	1971	Establishing a Governor's Commission to Establish a Comprehensive Plan for School District Organization and Collaboration, and defining its powers and duties.	"

Part II. — (con'd)

Governor Francis W. Sargent 1969-75

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
84	1971	Requiring the Secretary of Elder Affairs to develop and implement a Home Care Program for the elderly and the handicapped, and defining his powers and duties in relation thereto.	SEM and Acts of 1970, c. 862
85	1972	Requiring full disclosure by state regulatory agencies of contacts between such agencies and parties regulated by them.	SEM and Acts of 1969, c. 704
86	1972	Establishing a Citizen's Advisory Committee to the Executive Office of Elder Affairs, and a Professional Task Force to the Executive Office of Elder Affairs, and defining their powers and duties.	SEM
87	1972	Establishing an economic impact review reporting procedure for state agencies re works, projects, activities and regulations.	"
88	1972	Amending EO No. 54 re the State Civil Defense Agency's powers and duties.	CDA
89	1972	Establishing a Governor's Advisory Committee on the Apparel Industry, and defining its powers and duties.	SEM
90	1972	Establishing an Office of Minority Business Enterprise Assistance in the Executive Office of Communities and Development, and defining its powers and duties.	NC
91	1972	Establishing a Governor's Commission on Citizen Participation, to study state social services et al., and defining its powers and duties.	"
92	1972	Amending EO No. 81 re Governor's Commission on the Status of Women.	SEM

Part II. — (con'd)

Governor Francis W. Sargent 1969-75

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
93	1972	Establishing a Governor's Highway Safety Bureau, and defining its powers and duties; providing for state implementation of the Federal Highway Safety Act of 1970.	SEM
94	1972	Establishing a Governor's Commission to Examine the Financing and Organization of the Massachusetts Bay Transportation Authority, and defining its powers and duties.	"
95	1972	Amending EO No. 77 <i>Re</i> the Joint Correctional Planning Commission.	SEM
96	1973	Transfer of the State Department of Commerce and Development from the Executive Office of Communities and Development to the Executive Office of Manpower Affairs.	Acts of 1969, c. 704, s. 50A
97	1973	Establishing a Governor's Commission on Southeast Asia Prisoners of War, and defining its powers and duties.	NC
98	1973	Amending EO No. 97 immediately above.	"
99	1973	Establishing a Task Force <i>Re</i> an Open State University, and an Open University Advisory Council, and defining their powers and duties.	SEM
100	1973	Establishing a Governor's Committee on Physical Fitness and Sports, and defining its power and duties.	NC
101	1973	Designating the State Department of Mental Health as the state agency responsible for coordinating all state drug abuse programs and activities, and defining its powers and duties in relation thereto.	SEM

Part II. — (con'd)

Governor Francis W. Sargent 1969-75

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
102	1974	Establishing a Massachusetts Crime Control Council as a subcommittee of the Committee on Criminal Justice, and defining its powers and duties.	SEM and G.L. c. 6, ss. 156-156B
103	1974	Establishing a Resource Management Policy Council, and defining its power and duties.	SEM
104	1974	Establishing a Task Force on Ethnic Heritage Programs.	"
105	1974	Establishing a Postsecondary Education Commission, on defining its powers and duties.	SEM; P.L. 92-318; Federal Higher Education Act of 1965, Title XII, s. 1202
106	1974	Establishing a Massachusetts Policy Council on Drug Diversion Control, and defining its powers and duties.	SEM
107	1974	Establishing a Commission on Rail Services, and defining its powers and duties.	SEM: Federal Regional Rail Reorganization Act of 1973 (P.L. 93-236)
108	1974	Amending EO No. 75 re public access to public records under the Freedom of Information Act, so as to conform to subsequent amendments to that law.	SEM and Acts of 1973, c. 1050
109	1974	Establishing a Public Power Corporation Study Commission, and defining its powers and duties.	SEM

Part II. — (con'd)

Governor Francis W. Sargent 1969-75

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
110	1974	Establishing a Commission on Nuclear Safety, and defining its powers and duties.	SEM
111	1974	Regulating the management by state agencies of sensitive personal information gathered and held by them; establishing fair informational practices relative thereto; and defining the rights of individuals to whom such state agency information relates.	"
112	1974	Establishing a Governor's Commission on the Rights of the Disabled, and defining its powers and duties.	"
113	1974	Establishing a Governor's Advisory Council on Supported Work, and defining its powers and duties.	"

Governor Michael S. Dukakis, 1975-79

<i>EO No.</i>	<i>Date</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
114	1975	Establishing a Judicial Nominating Commission, and defining its powers and duties.	SEM
115	1975	Increasing the membership of the statutory Security and Privacy Council (G.L. c. 6, s. 170) and further defining its powers and duties.	"
116	1975	Amending EO No. 74 <i>re</i> governor's Code of Fair Practices.	NC
117	1975	Amending E.O. No. 116 above.	NC
118	1975	Designating the State Department of Mental Health as the state agency to coordinate state drug abuse programs and to perform duties under related federal aid legislation.	SEM, and P.L. 92-255

Part II. — (con'd)

Governor Michael S. Dukakis, 1975-79

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
119	1975	Reorganizing the Governor's Commission on the Status of Women, and redefining its powers and duties; EO No. 81 revoked.	SEM
120	1975	Establishing a Governor's Management Task Force, and defining its powers and duties.	CL
121	1975	Establishing a Social and Economic Opportunity Council, and defining its powers and duties.	SEM
122	1975	Establishing a Massachusetts Developmental Disabilities Council, and defining its powers and duties.	"
123	1976	Establishing a Local Government Advisory Committee, and defining its powers and duties.	"
124	1976	Reorganizing the Office of Minority Business Enterprise Assistance as the State Office of Minority Business Assistance, and redefining its powers and duties; EO No. 90 superseded.	CL
125	1976	Establishing a Massachusetts Housing Finance Agency Study Commission, and defining its powers and duties.	"
126	1976	Regulating relations between Indian tribal councils and state agencies providing services to "Native Americans".	SEM
127	1976	Amending EO No. 114 <i>re</i> the Judicial Nominating Commission.	"
128	1976	Establishing a Public Safety Council, and defining its powers and duties.	"
129	1976	Amending EO No. 128 immediately above.	"

Part II. — (con'd)

Governor Michael S. Dukakis, 1975-79

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
130	1976	Restricting the awarding of state contracts to firms participating in boycotts ordered by foreign powers (i.e. against Israel).	SEM
131	1976	Amending EO No. 105 <i>re</i> Postsecondary Education Commission.	NC
132	1977	Establishing a Governor's Advisory Committee on Computers and Data Processing, and defining its powers and duties.	SEM
133	1977	Establishing regional criminal justice planning agencies; defining their powers and duties; providing for implementation of the Federal Crime Control Act of 1973 (P.L. 93-83).	CL, and P.L. 93-83
134	1977	Promoting the economic revitalization of downtown centers of cities and towns by establishing procedures <i>re</i> locating state offices and buildings therein.	SEM
135	1977	Establishing a Massachusetts Statewide Health Coordinating Council, and defining its powers and duties; implementing the National Health Planning and Resources Development Act of 1974 (P.L. 93-641).	"
136	1977	Establishing a Governor's Commission on the Status of Women, and defining its powers and duties; EO No. 119 revoked.	"
137	1977	Establishing a Governor's Advisory Council on Puerto Rican and Hispanic Affairs, and defining its powers and duties; EO No. 69 revoked.	"

Part II. — (con'd)

Governor Michael S. Dukakis, 1975-79

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
138	1977	Establishing an Advisory Council on Vocational and Technical Education, and defining its powers and duties; implementing federal statutes (P.L. 90-576; and P.L. 94-482); EO Nos. 66 and 79 revoked.	SEM
139	1977	Establishing a Governor's Local Educational Advisory Council, and defining its powers and duties.	"
140	1977	Establishing a Massachusetts Occupational Information Coordinating Committee to implement certain federal statutes, and defining its powers and duties.	SEM, and P.L. 94-482
141	1978	Amending EO No. 122 <i>re</i> the Massachusetts Developmental Disabilities Council.	SEM
142	1978	State of emergency <i>re</i> Blizzard of February 7, 1978; civil defense regulations for said emergency.	SEM and CDA
143	1978	Equal employment opportunities for the handicapped; affirmative action requirements for state agencies.	CL
144	1978	Coordination of state agency efforts in civil defense emergencies in wartime and in natural or other disasters; EO No. 25 revoked.	CDA
145	1978	Consultation by state agencies with local governments <i>re</i> administrative mandates of such agencies imposing financial burdens on such local governments.	SEM
146	1978	Amending EO No. 137 <i>re</i> the Governor's Advisory Council on Puerto Rican and Hispanic Affairs.	NC

Part II. — (con'd)

Governor Michael S. Dukakis, 1975-79

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
147	1978	Establishing a Governor's Code <i>re</i> the Suspension and Debarment of Public Contractors.	CL
148	1978	Amending EO Nos. 105 and 131 <i>re</i> the Post-secondary Education Commission.	NC
149	1978	Regulations <i>re</i> state coordination and participation in the National Flood Insurance Program (24 CFR s. 1909 et al.).	CL
150	1978	Establishing an Office of Handicapped Affairs and a Handicapped Affairs Advisory Council in the State Office of Affirmative Action, and defining their powers and duties.	CL

Governor Edward J. King, 1979-

<i>EO No.</i>	<i>Date</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
151	1979	Amending EO Nos. 114 and 127 <i>re</i> the Judicial Nominating Commission.	NC
152	1979	Establishing a Governor's Management Task Force, and defining its powers and duties.	CL
153	1979	Authorizing the Executive Office of Communities and Development to apply for federal aid for fuel assistance to low-income families.	"
154	1979	Amending EO No. 151 <i>re</i> the Judicial Nominating Commission.	NC
155	1979	Establishing a Governor's Commission to Simplify Rules and Regulations, and defining its powers and duties.	"
156	1979	Reorganizing the Governor's Commission on the Status of Women, and redefining its powers and duties.	SEM

Part II. — (con'd)

Governor Edward J. King, 1979-

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
157	1979	Establishing state policy <i>re</i> the allocation and use of federal grants under the Comprehensive Employment and Training Act of 1973 (29 USC ss. 801 et seq.).	SEM
158	1979	Revoking EO No. 121 <i>re</i> the establishment of the Social and Economic Opportunity Council.	"
159	1979	Establishing a Governor's Advisory Committee on Children and the Family, and defining its powers and duties.	CL
160	1979	Establishing emergency regulations <i>re</i> the distribution of gasoline during national energy shortage.	SEM; CDA; PEO No. 12140
161	1979	Amending EO No. 156 <i>re</i> Governor's Commission on the Status of Women.	NC
162	1979	Establishing a Governor's Advisory Committee on Veterans' Affairs, and defining its powers and duties.	SEM
163	1979	Establishing further emergency regulations <i>re</i> the distribution of gasoline during national energy shortage; sales of gasoline by Massachusetts vendors to Connecticut motorists.	SEM; CDA; PEO No. 12140
164	1979	Amending EO No. 123 <i>re</i> the Local Government Advisory Committee.	NC
165	1979	Requiring the Marine Fisheries Advisory Commission and the Division of Marine Fisheries to develop a comprehensive fisheries policy for the Commonwealth under the Federal Fisheries Management and Conservation Act of 1976.	SEM

Part II. — (con'd)

Governor Edward J. King, 1979-

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
166	1979	Providing for the establishment of an electronic data processing center and planning unit in the Executive Office for Administration and Finance.	CL
166A	1979	Establishing a Massachusetts Juvenile Justice Advisory Committee, and defining its powers and duties; designating the Massachusetts Committee on Criminal Justice as the state agency to implement the state juvenile justice plan under the Federal Juvenile Justice and Delinquency Prevention Act of 1974 (P.L. 93-415).	"
167	1979	Establishing a Development Permit Coordination Office in the Governor's Development Office, and defining its powers and duties; regulating state agency applications for federal funds.	"
168	1979	Requiring state permit-granting and regulatory agencies to provide certain information and materials to the Governor's Commission to Simplify Rules and Regulations.	"
169	1979	Establishing a Massachusetts Foreign Business Council in the Governor's office, and defining its powers and duties.	CL
170	1979	Establishing a Governor's Task Force on Automobile Theft, and defining its powers and duties.	SEM
171	1979	Amending EO No. 170 immediately above.	NC

Part II. — (con'd)

Governor Edward J. King, 1979-

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
172	1979	Taking over the direction and control of the Massachusetts Bay Transportation during a fiscal emergency, and designating the MBTA Board of Directors as gubernatorial agents to administer the Authority.	SEM; CDA; G.L. c. 161A, s. 20
173	1980	Establishing a Governor's Committee on Property Tax Relief, and defining its powers and duties.	CL
174	1980	Establishing advisory committees to assist in implementing the recommendations of the Governor's Management Task Force, and defining their powers and duties.	SEM
175	1980	Amending EO No. 132 <i>re</i> the Governor's Advisory Committee on Computers and Data Processing.	"
176	1980	Establishing a Special Commission on the Laws and Regulations Governing the Alcoholic Beverage Industry, and defining its powers and duties.	"
177	1980	Amending EO No. 162 <i>re</i> the Governor's Advisory Committee on Veterans' Affairs.	"
178	1980	Amending EO No. 151 <i>re</i> the Judicial Nominating Commission.	NC
179	1980	Establishing a Task Force on Electric Utility Fuel Costs, and defining its powers and duties.	"
180	1980	State office white paper recycling program.	"

Part II. — (con'd)

Governor Edward J. King, 1979-

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
181	1980	Defining barrier beaches, and providing for the administration of state and federal aid therefor; regulating the management of such beaches owned by the state.	CL
182	1980	Amending EO No. 173 <i>re</i> the Governor's Committee on Property Tax Relief.	NC
183	1980	Establishing a Government Service Careers Program and administrative unit in the Division of Personnel Administration; defining the objectives of such program; defining the powers and duties of the Director of the Government Services Careers Program (an office created by this EO).	CL
184	1980	Establishing a Governor's Task Force on Probate and Family Court Procedures, and defining its powers and duties.	SEM
185	1980	Establishing a Bay State Skills Commission, and defining its powers and duties.	CL
186	1980	Establishing a Governor's Task Force on Juvenile Crime, and defining its powers and duties.	SEM
187	1980	Mandating that Secretariats of the Commonwealth define the scope, intent, and purpose of regulations being adopted as part of all existing and newly-promulgated regulations, and resolve any inter-agency regulatory conflicts.	CL
188	1980	Amending EO No. 132 <i>re</i> the Governor's Advisory Committee on Computers and Data Processing.	NC

Part II. — (con'd)

Governor Edward J. King, 1979-

<i>EO No.</i>	<i>Year</i>	<i>Subject</i>	<i>Legal Basis Cited</i>
189	1980	Declaring a state of emergency <i>re</i> the financing and continued operation of the Massachusetts Bay Transit Authority; taking control of the Authority, and placing its management in the Secretary of Transportation and Construction and the MBTA Board of Directors; authorizing the Authority to spend not more than \$41 million in excess of the budget authorized by the MBTA Advisory Board for fiscal 1980.	SEM; CDA; G.L. c. 161A; s. 20; "any other powers under Constitution."
190	1980	Regulating off-road vehicle ("dune buggy") operation on public lands containing coastal wetland resources.	CL

APPENDIX B

*Executive Order of President John F. Kennedy Relative
To the Preparation, Presentation, Filing and Publication
of Presidential Executive Orders and Proclamations*

EXECUTIVE ORDER 11030 of June 19, 1962
(As Amended)

Note: In the text of this Executive Order, below, amending Executive Orders are cited parenthetically at the end of the amended section. Also indicated parenthetically is the citation to this Executive Order, as amended, as it has been incorporated into the Code of Federal Regulations, as Title 1, c. 1, Part 19, ss. 19.1-19.6, this latter citation being given in the standard federal manner.

By virtue of the authority vested in me by the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. 301 et seq.), and as President of the United States, I hereby prescribe the following regulations governing the preparation, presentation, filing, and publication of Executive orders and proclamations:

Section 1. Form. Proposed Executive orders and proclamations shall be prepared in accordance with the following requirements:

- (a) The order or proclamation shall be given a suitable title.
- (b) The order or proclamation shall contain a citation of the authority under which it is issued.
- (c) Punctuation, capitalization, spelling, and other matters of style shall, in general, conform to the most recent edition of the Style Manual of the United States Government Printing Office.
- (d) The spelling of geographic names shall conform to the decisions of the Board on Geographic Names, established by Section 2 of the Act of July 25, 1947, 61 Stat. 456 (43 U.S.C. 364a).
- (e) Descriptions of tracts of land shall conform, so far as practicable, to the most recent edition of the "Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations," prepared by the Bureau of Land Management, Department of the Interior.

(f) Proposed Executive orders and proclamations shall be typewritten on paper approximately 8 x 13 inches, shall have a left-hand margin of approximately 1½ inches and a right-hand margin of approximately 1 inch, and shall be double-spaced, except that quotations, tabulations, and descriptions of land may be single-spaced.

(g) Proclamations issued by the President shall conclude with the following described recitation —

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, in the year of our Lord _____, and of the Independence of the United States of America the _____.

(Amended by Executive Order 11354, s. 1, of 1967, issued by President Lyndon B. Johnson; 1 CFR 19.1).

Section 2. Routing and approval of drafts. (a) A proposed Executive order or proclamation shall first be submitted, with seven copies thereof, to the Director of the Office of Management and Budget,¹ together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.

(b) If the Director of the Office of Management and Budget approves the proposed Executive order or proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality.

(c) If the Attorney General approves the proposed Executive order or proclamation, he shall transmit it to the Director of the Office of the Federal Register, National Archives and Records Service, General Services Administration: *Provided*, that in cases involving sufficient urgency the Attorney General may transmit it directly to the President; and *provided further*, that the authority vested in the Attorney General by this section may be delegated by him, in whole or in part, to the Deputy Attorney General, Solicitor General, or to such Assistant Attorney General as he may designate.

1. When the name of the Bureau of the Budget was changed by statute to the "Office of Management and Budget", the Office of the Federal Register corrected these references in this Executive Order accordingly.

(d) After determining that the proposed Executive order or proclamation conforms to the requirements of Section 1 of this order and is free from typographical or clerical error, the Director of the Office of the Federal Register shall transmit it and three copies thereof to the President.

(e) If the proposed Executive order or proclamation is disapproved by the Director of the Office of Management and Budget or by the Attorney General, it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval. (1 CFR 19.2).

Section 3. Routing and certification of originals and copies. (a) If the order or proclamation is signed by the President, the original and two copies thereof shall be forwarded to the Director of the Office of the Federal Register for publication in the FEDERAL REGISTER.

(b) The Office of the Federal Register shall cause to be placed upon the copies of all Executive orders and proclamations forwarded as provided in subsection (a) of this section the following notation, to be signed by the Director or by some person authorized by him to sign such notation: "Certified to be a true copy of the original."

(Amended by Executive Order 11354, s. 2 of 1967, issued by President Lyndon B. Johnson; 1 CFR 19.3).

Section 4. Proclamations calling for the observance of special days or events. Except as may be otherwise provided by law, responsibility for the preparation and presentation of proposed proclamations calling for the observance of special days, or other periods of time, or events shall be assigned by the Director of the Office of Management and Budget to such agencies as he may consider appropriate. Such proposed proclamations shall be submitted to the Director at least sixty days before the date of the specified observance. Notwithstanding the provisions of Section 2, the Director shall transmit any approved commemorative proclamations to the President. (Amended by Executive Order 12080 of 1978, issued by President Jimmy Carter; 1CFR 19.4).

Section 5. Proclamations of treaties excluded. Consonant with the provisions of Chapter 15 of Title 44 of the United States Code (44 U.S.C. 1511), nothing in these regulations shall be construed to apply

to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President.¹ (1CFR 19.5).

Section 6. Definition. The term "Presidential proclamations and Executive orders", as used in Chapter 15 of Title 44 of the United States Code (44 U.S.C. 1505(a)), shall, except as the President or his representative may hereafter otherwise direct, be deemed to include such attachments thereto as are referred to in the respective proclamations or orders.² (1CFR 19.6).

Section 7. Prior order. Upon its publication in the FEDERAL REGISTER, this order shall supersede Executive Order No. 10006 of October 9, 1948. (This section not included in 1 CFR 19).

The regulations prescribed by this order shall be codified under Title 1 of the Code of Federal Regulations.

JOHN F. KENNEDY

THE WHITE HOUSE,

June 19, 1962

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1. This text was corrected by the Office of the Federal Register to reflect statutory changes. The original section read thus: "Consonant with the provisions of Section 12 of the Federal Register Act (49 Stat. 503; 44 U.S.C. 312), nothing in this order shall be construed to apply to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President."
 2. The statutory citation in this text was corrected by the Office of the Federal Register to reflect statutory amendments. The former citation was: "Section 5(a) of the Federal Register Act (44 U.S.C. 305(a))."

APPENDIX C

Selected Bibliography of Documents Relative
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- Suspension of laws by governor: *Opinions of the Justices*, 315 Mass. 761 (1944); *Director of the Civil Defense Agency and Office of Emergency Preparedness v. Civil Service Commission*, 373 Mass. 401 (1977).
- War and emergency powers of governor: *Opinions of the Justices*, 315 Mass. 761 (1944); *Massachusetts Bay Transportation Authority Advisory Board v. Massachusetts Bay Transportation Authority*, 1981 Mass. Adv. Sheets 403.

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APPENDIX D

**Gubernatorial Ceremonial Proclamations Required By
The Massachusetts General Laws**

Note: The statute mandating each proclamation is cited in abbreviated form thus — “(6:12),” indicating Massachusetts General Laws, c. 6, s. 12, as amended through December 31, 1980.

35 Historical Anniversaries (Days)

Susan B. Anthony (6:15E)	Martin Luther King, Jr. (6:15S)
Armenian Martyrs (6:15II)	Thadeusz Kosciuszko (6:12BB)
Armistice (6:15R)	Marq. de Lafayette (4:7; 6:12H)
Commodore John Barry (6:12E)	Liberty Tree (6:15L)
Bataan-Corregidor (6:15Z)	Abraham Lincoln (6:13)
Battle of Bunker Hill (6:12C)	Horace Mann (6:12T)
Battle of New Orleans (6:12F)	Patriots' Day (6:12J)
Boston Massacre (6:12D)	Pearl Harbor (6:12DD)
John Carver (6:15HH)	Polish Constitution (6:12R)
Columbus (6:12V)	General Pulaski (6:12B)
Evacuation Day (6:12K)	St. Jean de Baptiste (6:15OO)
Federal Constitution (6:15A)	Spanish War and Battleship <i>Maine</i> Memorial Day (6:14A)
Flag Day (6:14)	State Constitution (6:14B)
Peter Francisco (4:17; 6:12S)	Town Meeting (6:15PP)
Independence Day (6:15DD)	United Nations (6:12N)
Iwo Jima (6:12AA)	U.S. Marine Corps (6:15Q)
Jamaican Independence (6:12Z)	George Washington (6:12T)
John F. Kennedy (4:7; 6:15L)	

30 Other Designated Days or Occasions

Arbor and Bird (6:15)	Mothers (6:12T)
Army and Navy Union (6:12T)	National Hunting and Fishing (6:15W)
Battleship Massachusetts (6:15M)	National Mourning (167:52)
Childrens (6:12U)	National Rejoicing (167:52)
Disabled American Veterans' Hospital (6:12T)	Purple Heart (6:12T)
	Social Justice for Ireland (6:15U)

Endangered Species (6:15EE)	State Walking Sunday (6:15NN)
Fathers (6:12T)	Student Government (6:12M)
Fire Fighters Memorial Sunday (6:15JJ)	Teachers (6:12X)
Grandparents and Senior Citizens (6:12T)	Veterans (6:12A)
Italian-American War Veterans of the United States (6:15J)	Veteran Firemen's Muster (6:12L)
Kalevala (6:15T)	Veterans of World War I Hospital (6:12T)
Loyalty (6:12O)	Vietnam Veterans (6:15MM)
Maritime (6:12Y)	White Cane Safety (6:15V)
Memorial Day (6:12Q)	Youth Honor (6:15G)
Retired Members of the Armed Forces (6:15CC)	

23 Designated Weeks and Months

American Education Wk. (6:12G)	Licensed Practical Nurse Week (6:15LL)
American History Mo. (6:15C)	Massachusetts Art Wk. (6:15D)
American Indian Heritage Wk. (6:12I)	Massachusetts National Guard Wk. (6:15BB)
Boy Scout Wk. (6:15H)	National Family Wk. (6:15KK)
Child Nutrition Wk. (6:15X)	Police Officers Wk. (6:15N)
Civil Rights Wk. (6:12P)	Pro-Life Mo. (6:15FF)
Cystic Fibrosis Wk. (6:15K)	Public Employees' Wk. (6:12CC)
Earth Wk. (6:14C)	Secretaries Wk. (6:15AA)
Employ the Handicapped Wk. (6:15F)	Senior Citizens Mo. (6:15B)
Employ the Older Worker Wk. (6:15GG)	Sight-Saving Mo. (6:12W)
Jaycee Wk. and Day (6:15Y)	Traffic Safety (6:15P)
Keep Massachusetts Beautiful Mo. (6:15O)	