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# The Executive Power In State And Federal Constitutions

By WILLIAM F. SWINDLER\*

## The Historical Background

**W**ATERGATE, in 1973, dramatized *inter alia* the haziness of federal constitutional law on the subject of the powers and functions of the executive branch. It accordingly invited revisitation of the theoretical and practical circumstances out of which the office itself evolved, both at the presidential level and in the gubernatorial articles of state constitutions which were antecedent to Article II.<sup>1</sup> Such a review of a subject so long taken for granted not only reveals certain parallels but also certain contrasts.<sup>2</sup>

Presidential power, in general, is less an outgrowth of specific constitutional provisions than a product of necessity and opportunity, augmented by the forcefulness of the personality of the occupant of the White House. Gubernatorial power, as will be indicated below, has emerged to its present portions more in terms of extraneous political and economic trends, in spite of an abundance of specific restraints written into the constitutional instruments. To the revolutionary and post-revolutionary generation, the concept of a strong central authority vested in a single chief executive seemed to be fundamentally dangerous; the colonial experience with arbitrary royal governors prompted the first state constitution makers to limit and divide the authority of the executive branch. But the alternative, of no executive author-

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1. U.S. CONST. art. II.

2. See generally 2 B. SCHWARTZ, *POWERS OF GOVERNMENT* ch. 9 (1963); R. NEUSTADT, *PRESIDENTIAL POWER* (1960); C. ROSSITER, *THE AMERICAN PRESIDENCY* (1956). On the subject of the state office, see generally C. RANSOME, *OFFICE OF THE GOVERNOR* (1956); L. LIPSON, *THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER* (1939).

ity at all, had been disastrously demonstrated in the national government attempted by the Articles of Confederation; thus, the Constitutional Convention of 1787 came to Philadelphia prepared to find a middle ground.

"There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government," Alexander Hamilton conceded, but he refuted this idea with an oft-quoted declaration: "A feeble executive implies a feeble execution of a government. A feeble execution is but another phrase for a bad execution. And a government ill executed, whatever it may be in theory, must be in practice a bad government."<sup>3</sup> Hamilton's own plan for an executive article for the new federal Constitution, taken largely from the New York Constitution of 1777, would have expressed a more affirmative catalog of powers. The New York Constitution, in any case, became the model for much of what the Philadelphia Convention eventually incorporated into Article II.<sup>4</sup> The primary consideration, consistent with Jeffersonian thought, was to insure legislative checks upon the executive; one of the fundamental "rights of Englishmen" for which the War of Independence had been fought was the control of the crown by Parliament.<sup>5</sup>

While the legislative checks and balances vis-à-vis the state executive had been written into most of the constitutions of the erstwhile colonies turned states, the first half century of experience with unchecked legislative power wrought substantial changes in constitutional theory. State assemblies proved all too susceptible to blandishments and even briberies, of the forces behind land company promotions, wildcat banks, and canal building, part of the panacea called "internal improvements."<sup>6</sup> In many of the new, trans-Alleghany states by the end of the first quarter of the nineteenth century, these depredations had brought many governments to the brink of bankruptcy. A new wave of constitution making set in, in which a dominant theme was the strengthening of a responsible executive office and a stricter circumscription of the legislative branch.<sup>7</sup>

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3. THE FEDERALIST No. 70, at 451 (B. Wright ed. 1961) (A. Hamilton).

4. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, 625-27 (1937).

5. See CONSTITUTIONAL DOCUMENTS OF THE AMERICAN REVOLUTION (W. Swindler ed. 1974).

6. See generally B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924).

7. Cf. B. RICH, STATE CONSTITUTIONS: THE GOVERNOR ch. 1 (1960) [hereinafter cited as RICH]. This work is one of a series of state constitutional studies prepared by the National Municipal League, the sponsors of the Model State Constitution (See

In the White House, executives like Jefferson with his initiative in authorizing the Louisiana Purchase (over his own constitutional doubts) and Andrew Jackson with his readiness to challenge Congress itself on the issue of the Second Bank of the United States, established precedents of authority within the generalities of the language of Article II.<sup>8</sup> While succeeding nineteenth century presidents and the vagaries of Reconstruction politics left a vacuum filled by an aggressive Congress, a revival of the executive authority began with the Square Deal of Theodore Roosevelt and the progressive movement climaxing in the New Freedom of Woodrow Wilson. The massive shift of power to the executive branch and centralized government which characterized the New Deal of Franklin D. Roosevelt set the course for strong and independent presidential authority which has continued to the present.<sup>9</sup>

The post-Civil War period generated the forces which encouraged the development of greater executive strength in the states almost a generation before the twentieth century presidential assertions of the first Roosevelt and Wilson. It has been pointed out that the administrative agencies in the government of New York grew from ten in 1800 to eighty-one in 1900 (and to 170 by 1925),<sup>10</sup> but the emergence of the modern administrative regulatory agency and its validation is marked by *Munn v. Illinois*,<sup>11</sup> dating from 1877. The Illinois Constitution of 1870, which created the state warehouse and grain elevator commission, one of the catalysts of the "Granger cases",<sup>12</sup> marked the next phase in state constitutional development. At the same time it planted a seed which grew into the concept of the divided executive function which has, as it has turned out, inhibited the effective growth of efficient executive power. The divided executive of the earlier constitutional period—exemplified in the independently elected offices of attorney general, secretary of state, treasurer, auditor, and state superintendent of education in many instances—was still

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note 30 *infra*). The League has also commissioned numerous monographs on the state constitutional problems; e.g., A. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING, 1938-1968 (1970).

8. See 2 N. SCHACHNER, THOMAS JEFFERSON 721-26 (1951); M. JAMES, ANDREW JACKSON 350-385 (1937).

9. See generally E. LINDLEY, HALFWAY WITH ROOSEVELT (1937).

10. Rich, *The Governor as Administrative Head*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION ch. 7 (J. Wheeler ed. 1961) [hereinafter cited as Rich, *The Governor as a Policy Leader*].

11. 94 U.S. 113 (1876).

12. W. SWINDLER, THE OLD LEGALITY, 1889-1932, ch. 4 (1969).

further divided by new constitutional articles establishing the independent regulatory commissions.<sup>13</sup>

Thus the problem of the executive in both state and national government in the United States in the twentieth century is the following: the presidential office has grown in authority within the all too vaguely defined contours of Article II while the gubernatorial office has grown under greater difficulties, primarily under the dual burdens of divided executive power and a too restrictive definition of constitutional authority. Obviously, the strong or charismatic individual makes a difference in either case—the two Roosevelts and Wilson (all of whom had gubernatorial preparation) in the presidency, men like Charles Evans Hughes of New York, Robert M. LaFollette of Wisconsin and Hiram Johnson of California (all of whom went on to national office) in the governors' chairs of the progressive era. But as the federal union approaches the final quarter of the twentieth century, it becomes increasingly evident that a clearer statement of constitutional theory of the executive function needs to be articulated.

### Executive Power in the 20th Century

If the presidential powers are left largely undefined in the federal Constitution, and have grown and taken shape through historical accretion, the executive function in most state constitutional frameworks has continued to be fairly strictly circumscribed and has developed by grace of a reluctant easing of judicial construction. A scanning of decisional law on the subject of the state executive power in general suggests that the judicial theory is one of agency; the first responsibility of the executive is the faithful implementation of laws which have been either legislatively enacted or judicially construed.<sup>14</sup> The state executive office is one of stringently limited discretion. There is no assumption that the executive has any option in determining whether or how much of a legislative mandate is to be carried out.<sup>15</sup> In contrast to recent presidential assertions of executive prerogative in this

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13. *E.g.*, ALA. CONST. art. XIII; CAL. CONST. art. XII; FLA. CONST. art. XI; ILL. CONST. art. XI. *Cf.* 1 F. COOPER, STATE ADMINISTRATIVE LAW chs. 1-3 (1965).

14. *See, e.g.*, Opinion of the Justices, 85 N.H. 562, 567, 154 A. 217, 223 (1931); Posner v. Levitt, 67 Misc. 2d 565, 324 N.Y.S.2d 553 (Sup. Ct. 1971), *aff'd* 37 App. Div. 2d 331, 325 N.Y.S.2d 519 (1971); Stander v. Kelley, 433 Pa. 406, 421-22, 250 A.2d 474, 482, *appeal dismissed & cert. denied*, 395 U.S. 827 (1969).

15. Loftus v. Department of Agriculture, 211 Iowa 566, 569, 232 N.W. 412, 414-15 (1930), *appeal dismissed*, 283 U.S. 809 (1931); Ball v. Board of Trustees, 251 Md. 685, 693, 248 A.2d 650, 655 (1968). *Cf.* Strutwear Knitting Co. v. Olson, 13 F. Supp. 384, 390-91 (D. Minn. 1936) (*dictum*).

and other relationships, the long-held view of at least one state court is that prerogative or privilege in a governor does not exist unless expressed in the constitution.<sup>16</sup>

The specific constitutional provisions concerning executive powers are generally paralleled in both national and state documents. The appointing and removal powers, the receiving of reports and accounts from other officers of the government and the reporting of the state of affairs to the legislative branch, pardons and reprieves for offenders against the laws of the jurisdiction, and the representation of the government in its relations with other sovereignties (with other states or the federal government in the case of governors, with foreign states and international organizations in the case of the president) are among those parallel provisions.

The vast freedom of action granted to the president in the field of foreign affairs<sup>17</sup> would make the national executive office more powerful than any state counterpart, even if no other obvious differences were manifested. In domestic affairs, however, the authority of both national and state executives has been circumscribed by the courts, although the restraints are more pervasive in the case of governors. The Supreme Court holdings in *Humphrey's Executor v. United States*<sup>18</sup> and in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>19</sup> have been anticipated, to a degree, by opinions such as that of the Colorado court denying a governor's removal powers over officials confirmed by the legislature, from the civil service level to the policymaking level.<sup>20</sup> Analogous holdings in other state jurisdictions may also be noted.<sup>21</sup> State executive authority is further constrained by the judicial doctrine that the authority is limited to express definitions to be found in the constitution or the statutes of the state. The governor, in effect, is the agent of the legislature.<sup>22</sup> As the California Supreme

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16. *Heyward v. Long*, 178 S.C. 351, 183 S.E. 145 (1935).

17. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

18. 295 U.S. 602 (1935).

19. 343 U.S. 579 (1952).

20. *Roberts v. People ex rel. Hicks*, 77 Colo. 281, 235 P. 1069 (1925). The power of the governor of Colorado to remove public officers had been uniformly restricted to the scope of the particular statutes involved. See *Trimble v. People ex rel. Phelps*, 19 Colo. 187, 34 P. 981 (1893); *Lamb v. People ex rel. Jefferds*, 3 Colo. App. 106, 32 P. 618 (1893).

21. *Cf. State ex rel. Yancey v. Hyde*, 121 Ind. 20, 22 N.E. 644 (1889); *Commissioner v. Kelley*, 350 Mass. 501, 215 N.E.2d 653 (1966); *Daly v. Hemphill*, 411 Pa. 263, 191 A.2d 835 (1963).

22. *Cf. Calvert v. Adams*, 388 S.W.2d 742, 747 (Tex. Civ. App. 1965). *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 214 P.2d 747 (1950).

Court has put it, most of the actions of the executive branch are ministerial, and ministerial acts are by definition non-discretionary.<sup>23</sup> This characteristic judicial attitude doubtless accounts for the fact that the use of executive orders for any but ceremonial purposes, which at the presidential level were developed by Franklin D. Roosevelt as a means of lessening dependence upon Congress,<sup>24</sup> has not in fact been followed by any state executive.<sup>25</sup>

The specifics of gubernatorial limitation are illustrated in the provisions of various state constitutions. In a dozen or more states, the executive may not succeed himself.<sup>26</sup> Taking the common denominators of most of the state charters, the governor's powers and functions may be said to fall into three principal categories: (1) duties with reference to the legislative process (messages and reports, approval or veto of bills, calling of extraordinary sessions),<sup>27</sup> (2) appointing and commissioning of state officers,<sup>28</sup> and (3) supervision of some, although seldom all, of the executive and administrative agencies of the state.<sup>29</sup> The narrow judicial interpretation of executive powers within these categories appears to derive from the thrust of the executive article in general. The traditional theory remains one of circumscribed and explicit powers, and the typical state constitution tends to distribute the powers among a number of independent offices. Valid as may have been the eighteenth and nineteenth century aversion to a centralization of authority, the needs of the twentieth century state are manifestly different. The drafters of the Model State Constitution,<sup>30</sup> accordingly, have concluded:

In keeping with the concept of the governor as leader of state administration. . . . the chief executive is also granted broad powers which permit him to take the initiative in administrative reorganization . . . .

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23. See *Harpending v. Haight*, 39 Cal. 189, 211 (1870). Discretionary acts of the executive are not justiciable except upon evidence of abuse of authority. *Ex parte Panagopoulos*, 3 F. Supp. 222 (S.D. Cal. 1933).

24. See W. SWINDLER, *THE NEW LEGALITY*, 1932-1968, 419 (1970).

25. See Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 IOWA L. REV. 78 (1964).

26. B. RICH, *supra* note 7, at ch. 2.

27. *Williams v. Kerner*, 30 Ill. 2d 11, 195 N.E.2d 680 (1963); *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771 (1963).

28. *Daly v. Hemphill*, 411 Pa. 263, 191 A.2d 835 (1963).

29. *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1963); *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1 (1957).

30. The Model State Constitution was first prepared in 1921 and is revised periodically. It is a composite of provisions taken from various states, with accompanying commentary.

The governor as responsible head of the administration should have the unencumbered power to select and, when necessary, remove the heads of all administrative departments. Public officials at the level of department head are not only administrators but policy makers and should be directly and personally responsible to the governor.

Arguments are frequently offered that the heads of certain departments should be directly responsible to the people and hence independently elected. For example, the argument is often applied to the attorney general. It is the policy reflected in the Model, however, that the attorney for a state must be a part of the chief executive's administrative team, must be ready to serve as the governor's legal advisor and be subject to the governor's direction, as is the case in the national government or in any large industrial or business corporation. To do otherwise, as unfortunately 43 states do, fractionalizes administration unnecessarily and in a particularly sensitive area of administration.<sup>31</sup>

Political considerations being what they are, the reduction in the number of independent constitutional executive officers would seem to be a long time in the future. The growth of centripetal administrative processes in the twentieth century has encouraged a kind of coordinating authority in the governorship. While Florida's cabinet system is unique among the states,<sup>32</sup> the combination of the governor's appointing power and his ex-officio membership in administrative agencies in many instances<sup>33</sup> has created opportunities for leadership which have made for greater uniformity of state policy.<sup>34</sup> A new concept, emulative of the national example,<sup>35</sup> of a power of executive reorganization under the governor was advocated by the Model State Constitution but was adopted in unequivocal terms only in the 1956 Alaska constitution and the 1971 Illinois constitution.<sup>36</sup>

### Prospects for the Future

The centralizing tendency of the government process as a phenomenon of the twentieth century has contributed to the imbalance

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31. MODEL STATE CONSTITUTION at 71-72 (Comments to §§ 5.06, 5.07).

32. McCullom, *Florida's Cabinet System—A Critical Analysis*, 43 FLA. B.J. 156 (1969).

33. *E.g.*, LA. CONST. art. IV, § 1, art. V, § 11, art. VI, §§ 19.1, 30, art. XII, § 7, art. XVIII, § 7; N.M. CONST. art. V, §§ 2, 4, art. § 6, OHIO CONST. art. VIII, §§ 8, 12; ORE. CONST. art. V, § 16, art. VIII, § 5; WYO. CONST. art. IV, § 7, art. XVIII, § 3.

34. *Cf.* language of NEB. CONST. art. IV, § 6.

35. *Cf.* Act of June 30, 1932, ch. 314, §§ 401-08, 47 Stat. 413-15; Act of Mar. 3, 1933, ch. 212, §§ 401-09, 47 Stat. 1517-20.

36. MODEL STATE CONSTITUTION art. V, § 5.06; ALAS. CONST. art. III, § 26; ILL. CONST. art. V, § 2.

of the separate powers of legislative and executive in favor of the latter, at the national level, despite the recurrent demands that Congress reclaim various facets of authority which have been given to the executive branch.<sup>37</sup> There is nothing to suggest that a significant shift back toward legislative supremacy is likely or desirable, at least in respect to national government. The Jeffersonian ideal of the paramountcy of popularly elected and controlled parliamentary bodies with accountable ministers of legislative programs—the theory of the British constitution<sup>38</sup>—has all but vanished from the national scene, and has been preserved in form at least at the state level by the continuing distribution or dissipation of executive authority among various independent offices. For some critics of contemporary state government, this is the crux of executive ineffectiveness: “constitutional barriers make larger issues virtually impossible of solution.”<sup>39</sup>

Diffusion of authority, in the view of another student of effective modern state government, is but the greatest of several basic problems: the restrictions on gubernatorial terms, both as to length and succession; constitutionally “frozen” executive procedures; and fiscal and budgetary controls which are drastically independent of the chief executive.<sup>40</sup> The case for reform and modernization (that is, centralization) is countered, as still another scholar has put it, by various “presures for separatism” which he enumerates as follows: “(1) a ‘normal’ drive for agency autonomy, (2) a historical background of separate responsibility to the electorate, (3) ‘reform’ movements for special functions, (4) clientele and interest group attitudes, (5) professionalism, (6) functional links to the national government, (7) a desire to insulate special types of programs, (8) a political division between legislature and governor, and (9) dissatisfaction with central political processes.”<sup>41</sup> Most of the factors among these nine speak for themselves.

What is really being urged upon modern state government is a definition of executive authority almost entirely in terms of state serv-

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37. See generally SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. DOC. No. 91-40, 91st Cong., 1st Sess. (1969) [hereinafter cited as S. DOC. No. 91-49].

38. H. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW chs. 1-3 (5th ed. (1973)).

39. RICH, *supra* note 7, at 33.

40. RICH, *The Governor as Policy Leader*, *supra* note 10, at 95. Cf. Carley, *Legal and Extra-Legal Powers of the Wisconsin Governor in Legislative Relations*, 1962 WIS. L. REV. 280.

41. F. HEADY, STATE CONSTITUTIONS: THE STRUCTURE OF ADMINISTRATION 5-6 (1961).

ices. The modern state executive, as distinguished from the national executive, would thus become a central administrator and the liaison officer between the executive/administrative functions and the legislature.<sup>42</sup> It is pertinent to observe that modern state government is principally exemplified by such major services as education, law enforcement, transportation, health and welfare, and natural resource management.<sup>43</sup> To these may be added the specific regulatory processes which evolved both from economic history and nineteenth-century reaction, for example, utility and corporation regulation, labor relations, and civil service.<sup>44</sup>

The principal need for a better defined executive power in this context is for central administration of the state administrative process itself. The type of state executive function which is emerging in the final quarter of the twentieth century is a component of modern federalism,<sup>45</sup> in which the states are essentially units of local administration and coordinates of a unified political economy. If this is in fact the prospect for the future, it is a logical consequence of the centripetal trend of modern government on the one hand and of the divided character of the state executive/administrative process on the other.

The national state, while it is confronted with this same tendency to merge executive and administrative functions,<sup>46</sup> has preserved the separate political function of the executive because of the nature of the national state itself. The president is ultimately distinguishable from any governor by virtue of his being the chief of state; this is a function uniquely ascribed to the national executive. Thus, in returning to the constitutional issues involved in the Watergate events, it may be perceived that *inter alia* they include a requirement for a restatement of the federal executive function as distinguished from the state executive function. This is unlikely to take formal constitutional shape. Rather, from this experience as from other experiences in our national history, the dimensions of presidential power will be settled at limits as broad as the legitimate needs of the government may require.

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42. Cf. J. KILPATRICK, *THE SOVEREIGN STATES* (1957).

43. E.g., provisions on conservation of natural resources are found in: ALAS. CONST. art. VIII; HAWAII CONST. art. X; MASS. CONST. art. XLIX; OHIO CONST. art. II, § 36.

44. A. RICHARDS, *The Heritage of the Eighteenth and Nineteenth Centuries*, in *THE FIFTY STATES AND THEIR LOCAL GOVERNMENTS* 39 (J. Fesler ed. 1967).

45. Cf. A. Miller, *Towards a Concept of Constitutional Duty*, 1968 SUP. CT. REVIEW 199 (P. Kurland ed. 1969).

46. See generally S. DOC. No. 91-49, *supra* note 37.