

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

CONTENTS

	Page
Order Authorizing Study	2
Letter of Transmittal to the Senate and House of Representatives	7
Letter of Transmittal to the Legislative Research Council	8
Summary of Report	9
CHAPTER I. INTRODUCTION	20
Legislative Study Directive	20
Gubernatorial Executive Orders Defined	21
Study Procedure	22
CHAPTER II. BRITISH AND COLONIAL ORDERS IN COUNCIL	24
Writs and Orders in Council Under British Law	24
Roots of American Practice in British Law	24
Writs	24
Orders in Council	25
Executive Orders of Colonial Governors of Massachusetts	26
Merged Legislative, Executive and Judicial Powers	26
Executive Orders of Governor and Council	27
CHAPTER III. GROWTH OF AUTHORITY OF MASSACHUSETTS GOVERNOR SINCE 1780	29
General Aspects	29
Constitutional Authority Shared Between Governor and Executive Council	29
Constitutional Status and Authority of Lieutenant-Governor	31
Twentieth Century Strengthening of the Governorship	32
Growth of Governor's Supervisory Responsibilities	33
CHAPTER IV. CONSTITUTIONAL BASES OF GUBERNATORIAL EXECUTIVE ORDERS IN MASSACHUSETTS	34
Silence of Constitution on Gubernatorial Executive Orders	34
Authority of Governor as Supreme Executive Magistrate	34
Constitutional Provisions	34
Inherent Powers of Governor as Supreme Executive Magistrate	36
Separation of Powers Aspects	39
1973 Opinion of Attorney General <i>re</i> Executive order No. 74	41

CONTENTS (*Continued*)

	Page
The Governor as the Agent of the Legislature	46
Duty of the Governor to Enforce the Laws	49
Enforcement of State and Federal Laws	49
Gubernatorial Executive Orders and Federal Aid Funds	49
Suspension of Laws by Gubernatorial Executive Order	51
Constitutional Provision	51
Roving Commission Prohibition	51
MBTA Cases of 1979-81	52
Executive Reorganization Powers of Governor	54
War Powers of the Governor	55
State Constitutional Provisions	55
Federal Constitutional Provisions	57
Attorney General's Advisory Opinions of 1943	58
Rulings of Supreme Judicial Court	59
 CHAPTER V. STATUTORY BASES OF GUBERNATORIAL EXECUTIVE ORDERS IN MASSACHUSETTS	
Statutory Bases Generally	61
Ceremonial Proclamations and Executive Orders	62
Early War Power Acts of 1917-45	63
Civil Defense Act of 1950 and Related Statutes	64
Civil Defense Act of 1950	64
Emergency Finance Act of 1951	71
Forestry Laws	71
Statutes Relating to Labor-Management Disputes	72
Slichter Act	72
MBTA Statute	74
Statutory Authority of Governor <i>re</i> Executive Branch	
Organization	75
State Administrative Procedure Act Aspects	77
 HAPTER VI. OTHER ASPECTS OF GUBERNATORIAL EXECUTIVE ORDERS IN MASSACHUSETTS	
Number and Subject Matter	80
Number of Executive Orders	80
Subject Matter of Executive Orders	81
Formulation of Gubernatorial Executive Orders	83
Procedural Aspects	83
Format of Gubernatorial Executive Orders	85
Special Problems Posed by Certain Gubernatorial Executive Orders	88

CONTENTS (*Continued*)

	Page
CHAPTER VII. GUBERNATORIAL EXECUTIVE ORDERS	
IN OTHER STATES	89
State Practices Generally	89
Variety of Authority	89
State Constitutional Provisions	90
State Statutory Provisions	91
Statutory Procedural Standards <i>re</i> Gubernatorial Executive	
Orders	94
State Practices Generally	94
Executive Order Statute of Idaho	98
Executive Order Statute of Minnesota	99
State Judicial Case Law <i>re</i> Gubernatorial Executive Orders	100
Sparse Nature of State Judicial Case Law	100
Judicial Case Law in 21 States	100
CHAPTER VIII. EXECUTIVE ORDERS OF THE PRESIDENT	
OF THE UNITED STATES	110
Constitutional and Historical Background	110
Constitutional Background	110
Historical Background	113
Judicial Treatment of PEOs	115
PEO Procedure	117
Initiation of PEOs	117
Processing by Office of Management and Budget	117
Processing by Department of Justice	119
Subsequent Processing	120
Proclamations	120
Attorney General Opinion of 1961	121
Congressional Oversight	121

TABLE

1. Number and Subject Matter of Gubernatorial Executive	
Orders in Massachusetts	82

APPENDICES

Page

A. INDEX OF MASSACHUSETTS GUBERNATORIAL EXECUTIVE ORDERS, 1941-80 123

B. EXECUTIVE ORDER OF PRESIDENT JOHN F. KENNEDY RELATIVE TO THE PREPARATION, PRESENTATION, FILING AND PUBLICATION OF PRESIDENTIAL EXECUTIVE ORDERS AND PROCLAMATIONS 154

C. SELECTED BIBLIOGRAPHY OF DOCUMENTS RELATIVE TO EXECUTIVE ORDERS 158

D. GUBERNATORIAL CEREMONIAL PROCLAMATIONS REQUIRED BY THE MASSACHUSETTS GENERAL LAWS 163

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.

