

1977

## Executive Reorganization: An Examination of the State Experience and Article V, Section 11 of the 1970 Illinois Constitution

Michael H. Holland

*Partner, Beatty, Levin & Holland, Chicago, IL*

William H. Luking

*Assoc., Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, IL*

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Michael H. Holland, & William H. Luking, *Executive Reorganization: An Examination of the State Experience and Article V, Section 11 of the 1970 Illinois Constitution*, 9 Loy. U. Chi. L. J. 1 (2015).

Available at: <http://lawcommons.luc.edu/lucj/vol9/iss1/2>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# Executive Reorganization: An Examination of the State Experience and Article V, Section 11 of the 1970 Illinois Constitution

MICHAEL H. HOLLAND\*  
WILLIAM H. LUKING\*\*

“The Governor, by Executive Order, may reassign functions among or reorganize executive agencies which are directly responsible to him.”

ILL. CONST., art. V, section 11 (1970)

“Reorganization is shuffling boxes and moving people around.”

*Hamilton Jordan*†

## INTRODUCTION

The new executive<sup>1</sup> and legislative articles<sup>2</sup> of the 1970 Illinois Constitution, drafted by delegates to the Sixth Illinois Constitutional Convention (Con-Con), were intended to provide the office of the Governor with modern and versatile governmental management tools.<sup>3</sup> These powers include the amendatory veto,<sup>4</sup> the reduction and item vetoes,<sup>5</sup> and the power to reorganize executive agencies

---

\* A.B., St. Louis University 1969; J.D., Northwestern University School of Law, 1972. Mr. Holland is a partner in the Chicago law firm of Beatty, Levin & Holland.

\*\* A.B., University of Notre Dame 1969; J.D., Northwestern University School of Law, 1972. Mr. Luking is associated with the Chicago law firm of Ross, Hardies, O'Keefe, Babcock & Parsons.

The authors would like to express their thanks to Mr. Barry Katz, presently a student at Northwestern University School of Law, for his research assistance in the preparation of this article. The authors are also indebted to the staff of the Illinois State Historical Library, Springfield, Illinois.

† Drew, *A Reporter at Large—Second Phase*, *The New Yorker*, May 23, 1977, at 123.

1. ILL. CONST. art. V.

2. ILL. CONST. art. IV. See generally Johnston, *The Legislative Process Under the 1970 Constitution*, 8 J. MAR. J. PRAC. & PROC. 251 (1975).

3. Tecson, *Article V—The Executive Article*, 52 CHI. BAR REC. 79, 82 (1970).

4. ILL. CONST. art. IV, § 9(e). See *People ex rel. Klinger v. Howlett*, 50 Ill. 2d 242, 278 N.E.2d 84 (1972); Comment, *A Dilemma in Springfield: The Scope and Limitations of the Governor's Amendatory Veto Power in Illinois*, 5 LOY. CHI. L. J. 394 (1970); and Hanley, *The 1970 Illinois Constitution and the Executive Veto*, 5 PUB. AFF. BULL. 1 (1972). By the Illinois amendatory veto, the executive may return a bill to the General Assembly together with specific recommendations for change to the house of origination. The bill becomes law if the legislature, by a majority vote of both houses, accepts such changes upon certification by the Governor. The constitutions of other states permit this form of executive action. See, e.g., N.J. CONST. art. 5, § 1; VA. CONST. art. V, § 6.

5. ILL. CONST. art. IV, § 9(d)(1970). By the item veto the governor may eliminate any item appropriated in a bill by the General Assembly. By a two-thirds vote of both houses the

and to reassign functions among these agencies by executive order.<sup>6</sup> However, while gubernatorial reorganization authority has existed since the new constitution became effective July 1, 1971,<sup>7</sup> until the issuance by Governor James R. Thompson of Executive Orders 1977-1 and 1977-2 on March 31, 1977,<sup>8</sup> no Illinois chief executive had exercised this authority.<sup>9</sup>

The use of Illinois' constitutional executive reorganization powers by Governor Thompson comes at a time when considerable interest exists in executive reorganization at the federal level.<sup>10</sup> Reorganization was a central issue in the nomination and election campaigns of President Jimmy Carter,<sup>11</sup> and within the first three months of his term in office the new President secured passage of the Reorganization Act of 1977.<sup>12</sup> The Act reinstated until April 5, 1980, the reorganizational authority of the President which originated in the Reorganization Act of 1949,<sup>13</sup> and had expired on April 1, 1973 through the failure of Congress to enact an extension.<sup>14</sup>

This article will examine the authority conferred upon the Illinois chief executive by article V, section 11 of the 1970 Illinois Constitu-

legislature may restore any such vetoed item. *See also* ILL. CONST. art. V, § 16 (1870). The reduction veto permits the governor to reduce the amount of any item of appropriation. By a majority vote of both houses any item reduced by the governor may be restored.

6. ILL. CONST. art. V, § 11 (1970), the full text of which provides:

SECTION 11. GOVERNOR—AGENCY REORGANIZATION

The Governor, by Executive Order, may reassign functions among or reorganize executive agencies which are directly responsible to him. If such a reassignment or reorganization would contravene a statute, the Executive Order shall be delivered to the General Assembly. If the General Assembly is in annual session and if the Executive Order is delivered on or before April 1, the General Assembly shall consider the Executive Order at that annual session. If the General Assembly is not in annual session or if the Executive Order is delivered after April 1, the General Assembly shall consider the Executive Order at its next annual session, in which case the Executive Order shall be deemed to have been delivered on the first day of that annual session. Such an Executive Order shall not become effective if, within 60 calendar days after its delivery to the General Assembly, either house disapproves the Executive Order by the record vote of a majority of the members elected. An Executive Order not so disapproved shall become effective by its terms but not less than 60 calendar days after its delivery to the General Assembly.

7. ILL. CONST. TRANSITION SCHEDULE § 1 (1970).

8. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 80th Illinois General Assembly 847, 852 (March 31, 1977); JOURNAL OF SENATE, 80th Illinois General Assembly 8, 12 (April 6, 1977).

9. *But see* text accompanying notes 244 through 268 *infra*.

10. *See* text accompanying notes 16 through 72 *infra*.

11. *See* J. WITCOVER, MARATHON: THE PURSUIT OF THE PRESIDENCY 1972-1976, 207-208, 336, 578 (1977). During the first televised debate with President Ford, candidate Carter outlined his plans for a "complete reorganization of the executive branch," N. Y. Times, September 24, 1976, at 1, col. 4.

12. 91 Stat. 29 (codified at 5 U.S.C.A. §§ 901 *et seq.* (1977)).

13. 5 U.S.C. §§ 901 *et seq.* (1970 & Supp. IV (1974) & U.S.C.A. (1977)).

14. *See* Berg, *Lapse of Reorganization Authority*, 35 PUB. AD. REV. 195 (1975).

tion, its extent and limitations, and the historical antecedents and development of executive reorganization in Illinois. The 1970 Illinois constitutional power will be examined in light of the extensive history of federal executive reorganizational authority and the constitutional and statutory executive reorganization mechanisms in other states. Where appropriate, the two recent Illinois Executive Orders will serve as the basis for an examination of several questions of constitutional interpretation presented by article V, section 11. These questions will highlight areas which the General Assembly should explore for possible legislative action augmenting the reorganizational process authorized by that section.

The legislative response to the process of executive reorganization will also be examined. This is of particular importance because it poses an inherent limitation on reorganization by executive initiative. Because the legislature's power clearly extends to revising the structure of government, the legislature may always claim reorganization as its prerogative. Historically and practically, major governmental reorganizations have been effected only through ordinary legislative action resulting in statutory change subject to executive veto, even if the reorganizations were proposed or initiated legislatively by the executive.<sup>15</sup>

The record of the most recent Constitutional Convention's consideration of the Illinois agency reorganization provision reveals that the full history of the federal experience was not thoroughly examined. A more careful study of the federal statutory authority and the implementation of reorganization of the federal executive branch during the past fifty years might have resulted in a version of article V, section 11 fully incorporating the procedures of the statutory federal reorganization authority.<sup>16</sup>

#### THE FEDERAL BACKGROUND

The power of the United States President to reorganize agencies under statutory authority granted by Congress and similar authority available to other state governors have been cited as arguments

---

15. See, e.g., text accompanying notes 178 through 189 *infra*, discussing the development of the Illinois Civil Administrative Code under Governor Frank O. Lowden. At the federal level major reorganizational measures have also been effected through statute. See, e.g., Department of Defense Reorganization Act of 1958, 72 Stat. 514 (1958); 79 Stat. 667 (1965) (creating Department of Housing and Urban Development); 80 Stat. 931 (1966) (creating Department of Transportation); Postal Reorganization Act of 1970, 84 Stat. 719 (1970); and Department of Energy Organization Act, 91 Stat. 565 (1977). *But cf.*, Reorganization Plan No. 1 of 1953, 67 Stat. 631; 67 Stat. 18 (1953) (creating Department of Health, Education and Welfare).

16. 5 U.S.C. §§ 901 *et seq.* (1970 & Supp. IV (1974) & U.S.C.A. (1977)).

for empowering Illinois' governor with comparable power.<sup>17</sup>

Federal experience with executive reorganization<sup>18</sup> dates back to the World War I presidency of Woodrow Wilson. By an Act of May 20, 1918,<sup>19</sup> Congress granted to the President for the "continuance of the present war and for six months after the termination of the war . . ." the first statutory executive reorganization powers. Pursuant to this authority, President Wilson was authorized

to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall deem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute . . . .<sup>20</sup>

Twenty-four wartime orders were issued pursuant to this law.<sup>21</sup>

Executive reorganization powers were granted next to President Herbert Hoover in 1932 as a Depression governmental economy measure.<sup>22</sup> President Hoover sought these powers from Congress,<sup>23</sup> which responded by passing a law authorizing the President to transfer all or part of an independent executive agency or its functions to another executive department agency or from the jurisdiction and control of one executive department to that of another.<sup>24</sup> The President was also empowered to consolidate or redistribute the functions vested by law in any executive department or agency.

17. REPORT OF THE COMMISSION ON STATE GOVERNMENT—ILLINOIS—TO THE GENERAL ASSEMBLY AND THE GOVERNOR 9-10 (1967); *Committee on the Executive, Proposal Number 1* at 53-54, 6th Illinois Constitutional Convention, COMMITTEE PROPOSALS, vol. VI at 389-90 (1970); D. NETSCH, THE EXECUTIVE, CON-CON—ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 144, 174 (1970); Tecson, *Article V—The Executive Article*, 52 CHI. BAR REC. 79 (1970).

18. See generally Comment, *Reorganization of the Executive Branch*, 48 COLUM. L. REV. 1211 (1948); Torpey, *Executive Reorganization Within the Federal Government*, 31 MINN. L. REV. 263 (1947); Torpey, *Executive Reorganization in 1947*, 32 MINN. L. REV. 150 (1948); Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 MARQ. L. REV. 89 (1949); Mansfield, *Federal Executive Reorganization: Thirty Years of Experience*, 39 PUB. AD. REV. 431 (1969); Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 LAW & CONTEMP. PROB. 461 (1970); H. EMMERICH, FEDERAL REORGANIZATION AND ADMINISTRATIVE MANAGEMENT (1971).

19. 40 Stat. 556 (1918).

20. *Id.*

21. See generally W. F. WILOUGHBY, GOVERNMENT ORGANIZATION IN WARTIME AND AFTER 6-7 (1919).

22. Section 401 of the Act of June 30, 1932, 47 Stat. 413, provided as a declaration of policy: "In order to further reduce expenditures and increase efficiency in government . . ."

23. See 75 CONG. REC. 22, 26 (1932).

24. 47 Stat. 413 (1932).

However, the power to abolish any executive department or agency created by statute was specifically withheld.<sup>25</sup> To effect a reorganization or transfer under the 1932 law, the President issued executive orders which became effective sixty days after submission to Congress, unless either branch of Congress passed a resolution of disapproval before the sixty days elapsed.<sup>26</sup> President Hoover promulgated eleven executive orders which would have reorganized or consolidated executive functions.<sup>27</sup> Agencies affected by these executive orders included the Bureau of the Budget, the Departments of Commerce,<sup>28</sup> Justice, Agriculture, Interior, the Coast Guard, the Veterans Administration and the Civil Service Commission. However, none of these orders took effect due to a House resolution of disapproval.<sup>29</sup>

The Economy Act of 1933 amended the 1932 reorganization Act to provide that executive orders effecting reorganization were no longer subject to nullification by one house of Congress.<sup>30</sup> By executive order the President could abolish statutory agencies and functions. However, the power of the President to reorganize, unlimited in duration under the 1932 Act, was specifically limited by the Economy Act to a two-year period, terminating two years from March 20, 1933.<sup>31</sup> Since there was no provision for nullification by congressional resolution, a change could be blocked only if Congress passed a law to that effect. However, like every law, this congressional action would be subject to presidential veto.<sup>32</sup> Ten executive

---

25. 47 Stat. 414, § 406 (1932) provided:

Whenever, in carrying out the provisions of this title, the President concludes that any executive department or agency created by statute should be abolished and the functions thereof transferred to another executive department or agency or eliminated entirely the authority granted in this title shall not apply, and he shall report his conclusions to Congress, with such recommendations as he may deem proper.

26. 47 Stat. 414, § 407 (1932).

27. Exec. Order No. 5959 (1932); Exec. Order No. 5960 (1932); Exec. Order No. 5961 (1932); Exec. Order No. 5962 (1932); Exec. Order No. 5963 (1932); Exec. Order No. 5964 (1932); Exec. Order No. 5965 (1932); Exec. Order No. 5966 (1932); Exec. Order No. 5967 (1932); Exec. Order No. 5968 (1932); Exec. Order No. 5969 (1932).

28. See, e.g., Exec. Order No. 5960 (1932), consolidating certain functions within the Department of Commerce.

29. H. R. Res. 334, 72d Cong., 2d Sess., 76 CONG. REC. 2126 (1933).

30. 47 Stat. 1517, § 401 (1933). This measure was also clearly viewed as an economy response to the Great Depression. The declaration of policy preceding this Act stated: "The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title." See text accompanying notes 318 through 320 *infra*.

31. 47 Stat. 1519, § 409 (1933).

32. The dynamics of the 1933 authority have been analyzed in this manner:

Presumably, a joint resolution by both houses of Congress would have been neces-

orders were issued by President Roosevelt under the authority of this Act,<sup>33</sup> which expired by its own terms in 1935. Despite vigorous efforts by the Roosevelt Administration to have reorganizational powers reinstated,<sup>34</sup> Congress let this presidential authority lapse for a period of four years.

The Reorganization Act of 1939<sup>35</sup> granted to the executive extensive reorganization powers and established a mechanism which has served as the model for all subsequent federal reorganization acts. The "reorganization plan"<sup>36</sup> had its birth in this Act. Under the 1939 law, a plan of reorganization (rather than an executive order) was to be submitted to Congress by the President and would take effect at the end of sixty days, if during such period a concurrent resolution of disapproval by *both* houses of Congress had not been passed. No plan could provide for the transfer of an executive department, or of the functions of a department or agency, and no new department could be established by a plan. The duration of authority under this Act was only two years.<sup>37</sup> Between the effective date of this Act and its self-effecting expiration, President Roosevelt promulgated five plans,<sup>38</sup> all of which instituted fairly substantial

sary in order to disapprove an executive order; and the joint resolution would have had to go to the President for his signature. If (the contingency was remote) the President had vetoed a resolution disapproving his executive order, a two-thirds vote of each house would have been necessary to make congressional opinion effective.

Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. AD. REV. 176, 178 (1941).

33. Exec. Order No. 6084 (1933); Exec. Order No. 6145 (1933); Exec. Order No. 6166 (1933); Exec. Order No. 6611 (1934); Exec. Order No. 6614 (1934); Exec. Order No. 6639 (1934); Exec. Order No. 6670 (1934); Exec. Order No. 6694 (1934); and Exec. Order No. 6726 (1934).

34. In 1938, the Executive Reorganization Bill, S. 3331, 75th Cong., 3d Sess., 83 CONG. REC. 1168 (1938), was introduced by the Roosevelt administration to further extend reorganization power. However, in the wake of the Supreme Court "packing" proposal, this measure was recommitted by a vote of 204 to 96 in a heavily Democratic controlled House of Representatives. See Harris, *The Progress of Administrative Reorganization in the 75th Congress*, 31 AM. POL. SCI. REV. 862 (1937); Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. AD. REV. 176 (1941); R. POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT 28-181 (1966); H. EMMERICH, FEDERAL REORGANIZATION AND ADMINISTRATIVE MANAGEMENT 129-34 (1971).

35. 53 Stat. 561 (1939).

36. 53 Stat. 561, § 4(d) (1939) provided for "a reorganization plan for the making of the transfers, consolidations, and abolitions" sought to be effected by the President, rather than by executive order, as provided for under the 1932 reorganization law and the Economy Act of 1933.

37. 53 Stat. 561 § 12 (1939).

38. Reorganization Plan No. I, 53 Stat. 1423 (1939); Reorganization Plan No. II, 53 Stat. 1431 (1939); Reorganization Plan No. III, 54 Stat. 1231 (1940); Reorganization Plan No. IV, 54 Stat. 1234 (1940); Reorganization Plan No. V, 54 Stat. 1238 (1940). See generally Millett

changes in the structure of the executive branch.<sup>39</sup>

In 1941 Congress passed the first War Powers Act,<sup>40</sup> a temporary grant of power to the executive department to reorganize the executive branch as a means of facilitating the conduct of World War II and to replace the 1939 Act. Four years later the Reorganization Act of 1945 was passed to prevent automatic reversion of agencies transferred during the war to their former status.<sup>41</sup> Under this Act, President Truman submitted six reorganization plans to Congress, four of which went into effect.<sup>42</sup>

In 1947 Congress took action to re-examine the reorganization process, partially as a response to the controversy between President Truman and the Eightieth Congress over these six plans.<sup>43</sup> The Lodge-Brown Act, passed by the Eightieth Congress in 1947, created the Commission on Organization of the Executive Branch of the Government.<sup>44</sup> This advisory body, known as the Hoover Commission, was directed by Congress to promote "economy, efficiency and improved service," in the executive branch.<sup>45</sup> A recommendation of this Commission resulted in the Reorganization Act of 1949.<sup>46</sup> While this law did not authorize all the executive powers asked for by President Truman or suggested by the Hoover Commission,<sup>47</sup> it did provide that a proposed reorganization plan could be blocked within sixty days of its submission by vote of the constitutional majority

& Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. AD. REV. 176 (1941).

39. See, e.g., Reorganization Plan No. I, 53 Stat. 1423 (1939), transferring the Bureau of the Budget from the Department of the Treasury to the Executive Office of the White House.

40. 55 Stat. 838 (1941).

41. 59 Stat. 613 (1945).

42. Reorganization Plan No. 2 of 1946, 60 Stat. 1095 (1946); Reorganization Plan No. 3 of 1946, 60 Stat. 1097 (1946); Reorganization Plan No. 1 of 1947, 61 Stat. 951 (1948); Reorganization Plan No. 3 of 1947, 61 Stat. 954 (1948). Two of the plans were expressly disapproved by Congress. See 60 Stat. 1329 (1946) (concurrent resolution of disapproval of Reorganization Plan No. 1 of 1946); 61 Stat. 1023 (1947) (concurrent resolution of disapproval of Reorganization Plan No. 2 of 1947). See generally Torpey, *Executive Reorganization Within the Federal Government*, 31 MINN. L. REV. 263 (1947); Torpey, *Executive Reorganization in 1947*, 32 MINN. L. REV. 150 (1948).

43. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 LAW & CONTEMP. PROB. 461, 481 (1970).

44. 61 Stat. 246 (1947).

45. *Id.* at § 1. See generally Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 MARQ. L. REV. 89 (1949); Heady, *A New Approach to Federal Executive Reorganization*, 41 AM. POL. SCI. REV. 1118 (1947); *The Hoover Commission: A Symposium* (Keonig, ed.), 43 AM. POL. SCI. REV. 933 (1949).

46. 63 Stat. 203 (1949); see Heady, *The Reorganization Act of 1949*, 9 PUB. AD. REV. 165 (1949).

47. The Hoover Commission had strongly urged that permanent reorganization authority be granted to the President. General Management of the Executive Branch, H.R. Doc. No. 37, 81st Cong., 1st Sess. vii-xii (1949).

of *either* house of Congress. The Act also eliminated a provision which had been contained in prior laws exempting specific agencies from the reach of the President's reorganization power.<sup>48</sup> The original authority granted by the Act expired April 1, 1953.<sup>49</sup>

While the one chamber veto provision of the Reorganization Act of 1949 has been a feature of subsequent statutory executive reorganization authority and the method by which Congress has aborted several Presidential reorganizations by executive order,<sup>50</sup> the constitutionality of this process has never been determined by the Supreme Court. Although President Hoover's Attorney General expressed doubts as to the constitutionality of the 1932 Act,<sup>51</sup> litigation attacking the Economy Act of 1933 was terminated by the Supreme Court's refusal to consider constitutional challenges, as Congress in approving subsequent appropriations and by passing legislation had

---

48. The 1939 Reorganization Act expressly excluded certain agencies from the executive's reach:

No reorganization plan . . . shall provide —

. . . .

In the case of the following agencies, for the transfer, consolidation, or abolition of the whole or any part of such agency or of its head, or of all or any of the functions of such agency or of its head: Civil Service Commission, Coast Guard, Engineer Corps of the United States Army, Mississippi River Commission, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, General Accounting Office, Interstate Commerce Commission, National Labor Relations Board, Securities and Exchange Commission, Board of Tax Appeals, United States Employees' Compensation Commission, United States Maritime Commission, United States Tariff Commission, Veterans' Administration, National Mediation Board, National Railroad Adjustment Board, Railroad Retirement Board, the Federal Deposit Insurance Corporation, or the Board of Governors of the Federal Reserve System; . . . .

53 Stat. 561, § 3(b) (1939).

49. 63 Stat. 203, § 5(b) (1949).

50. See, e.g., *Reorganization Plan No. 1 of 1962, H.R. 530, 87th Cong., 2d Sess.*, 108 CONG. REC. 2700 (1962).

51. 37 OP. ATT'Y GEN. 56, 63-64 (1933):

By section 407 it was provided that the Executive order should be transmitted to the Congress in session and should not become effective until after the expiration of 60 days from such transmission and that "if either branch of Congress within such 60 calendar days shall pass a resolution disapproving of such Executive order or any part thereof, such Executive order shall become null and void to the extent of such disapproval." It must be assumed that the functions of the President under this act were executive in their nature or they could not have been constitutionally conferred upon him, and so there was set up a method by which one house of Congress might disapprove Executive action. No one would question the power of Congress to provide for delay in the execution of such an administrative order, or its power to withdraw the authority to make the order, provided the withdrawal takes the form of legislation. The attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity of the entire provision in the Act of June 30, 1932, for Executive reorganization of governmental functions.

tacitly confirmed reorganizations made by the President.<sup>52</sup> Judicial review of subsequent federal reorganization statutes has involved challenges to specific transfers and delegations, with only collateral attacks upon the reorganizational authority itself.<sup>53</sup> However, recent litigation concerning other uses of the legislative veto casts new doubts as to the constitutionality of this process.<sup>54</sup> While current debate does not center on the use of the legislative veto in the reorganization context, the eventual resolution of this issue could affect the constitutionality of the federal process,<sup>55</sup> and, by analogy, features of comparable state reorganization provisions.

52. See *Swayne & Hoyt v. United States*, 300 U.S. 297 (1937); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1937).

53. See *United States v. Paramount Publix Corp.*, 73 F.2d 103 (C.C.P.A. 1934); *Federal Trade Commission v. Gibson*, 460 F.2d 605 (5th Cir. 1972) (challenge to delegation of subpoena power to regional offices under Reorganization Plan No. 4 (1961)); *United States v. Irick*, 497 F.2d 1369 (5th Cir. 1974), *cert. denied, sub nom. Myers v. United States*, 420 U.S. 945 (1975); *United States v. Hillsman*, 522 F.2d 454 (7th Cir.), *cert. denied*, 423 U.S. 1035 (1975) (inclusion of officers of Drug Enforcement Administration within statute pertaining to "officers or employee of Bureau of Dangerous Drugs" under Reorganization Plan No. 2 (1973) and Exec. Order No. 11727 (1973)). It should be noted that one writer has commented: "So far as I am aware no reorganization plan under the 1939 or later statutes has been challenged in litigation." Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 LAW & CONTEMP. PROB. 461, 465 (1970).

54. See, e.g., *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *cert. denied, sub nom. Clark v. Kimmitt*, 97 S.Ct. 2667 (1977) (challenge to legislative veto provisions of Federal Election Campaign Act); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) (challenge to one house veto provision of Federal Salary Act, 2 U.S.C. 359 (1)(B) (1970)).

55. See U.S. CONST. art. I § 7, cl. 3; Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. AD. REV. 176 (1941); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEG. 593 (1976); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); J. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* (1977); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND. L.J. 323 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Keefe, *The Legislative Veto: Now You See It, Now You Don't*, 63 A.B.A.J. 1296 and 1474 (1977).

Debate exists as to the constitutionality of this feature. See Letter of Hon. Griffin B. Bell, Atty. Gen. (January 31, 1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 501 Appendix I to S. REP. No.95-32 (to accompany S. 626, Reorganization Act of 1977) 95th Cong., 1st Sess., 1977, which stated, in part:

Article I, § 7, clause 3 of the Constitution provides that "every Order, Resolution, or Vote" to which concurrence of both Houses is necessary shall be presented to the President for his approval or veto. Section 906 of the reorganization statute authorizes Congress to take action by simple resolution of either House, a form of congressional action which is outside the legislative procedures set out in Article I. That statute authorizes Congress to exercise procedural power not explicitly granted to it by the Constitution. However, the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress.

\*\*\*

In conclusion, I reiterate that my opinion as to the constitutionality of the legisla-

tive veto device is limited to the narrow context of the reorganization statute. This procedure is uniquely appropriate to executive reorganization. The reorganization statute does not affect the rights of citizens or subject them to any greater governmental authority than before. It deals only with the internal organization of the executive branch, a matter in which the President has a peculiar interest and special responsibility.

See also *Buckley v. Valeo*, 424 U.S. 1 (1976), especially concurring opinion of Mr. Justice White, 424 U.S. at 257. However, the following colloquy between Senator Sam Ervin and the late Professor Alexander M. Bickel should also be noted:

SENATOR ERVIN. On the question about approximating this matter to the machinery that was set up for reorganization. I would be glad if you would make any comment on that phase of it.

PROFESSOR BICKEL. I heard that discussion, Mr. Chairman. The Assistant Attorney General was in no position to attack or even throw doubt on the constitutionality of the Reorganization Act, which his Chief has just employed to good purpose no more than a week or two ago.

I labor under no such constraints at all. I know that it has been in effect and it has entered the practice of the Constitution if not its theory for over a generation now. However, I cannot reconcile it with my view of the requirements of the separation of powers.

You may recall that the present Reorganization Act evolved from a provision for a veto, so-called, by both Houses of Congress, which at least approximates more the model that the Constitution presupposes, although I do not think quite makes it either, because the difficulty is the short-circuiting of the President's veto power. He ought to have the power to veto any repealer, partial though it may be, by Congress of a prior statute.

I think there are difficulties with it also the other way around. It is an excessive delegation to the Executive without adequate standards. Where it delegates power to him to reorganize the Department of Agriculture, which he has in charge anyway, that difficulty may be ameliorated somewhat, because that is that shadow area where executive and legislative powers coincide or both exist, and perhaps the delegation problem is not so serious there.

In a thing like the reorganization of the District, however, I think the delegation problem is extremely serious, and to me unanswerable. And the other way around, the difficulty created by Congress and now one House of Congress acting by itself, having the power to veto a reorganization plan which the President has proposed—that seems to me inescapably to run counter to the constitutional arrangement. Once you grant the constitutionality of that, as the Assistant Attorney General felt constrained to do this morning, or concede even *arguendo* the constitutionality of that, I thoroughly agree with the argument that you pressed him to the wall with this morning. Once we have lodged a veto power in one House of Congress only, and that's accepted, well, then, what is the difficulty with reducing the institution which exercises the veto a little further, down to a committee. It is difficult to make the distinction. But I cannot grant the premise. I do not think the arrangement is constitutional to begin with.

SENATOR ERVIN. I have convinced myself to this point. If the principle of the Reorganization Acts is constitutional, then a comparable procedure allowing Congress to veto watershed projects conceived by the Executive is also constitutional.

PROFESSOR BICKEL. I quite agree.

SENATOR ERVIN. And if the latter is unconstitutional then the former is unconstitutional.

PROFESSOR BICKEL. I quite agree with that.

Hearings before the subcommittee on Separations of Powers of the Senate Judiciary Committee, 90th Cong., 1st Sess. pt. 1, 250-51 (1967).

The 1949 Act, as extended and modified,<sup>56</sup> has served as the authority for the issuance of ninety-three proposed reorganizational plans.<sup>57</sup> Seventy-three of these plans went into effect and twenty were rejected by at least one house of the Congress.

On April 1, 1973, the authority of the 1949 Act expired.<sup>58</sup> Immediate proposals from Congress to reinstitute this authority included fairly radical modifications in the Act's basic structure.<sup>59</sup>

### *The Reorganization Act of 1977*

The Reorganization Act of 1977,<sup>60</sup> effective April 6, 1977, in essence returned to the President the same reorganization powers contained in the statute which expired April 1, 1973.<sup>61</sup> The authority of the President to submit reorganization plans to Congress, in a manner substantially the same as that in effect under the twenty-four year life of the 1949 Act, has been restored for at least the next three years. Under this new authority, a reorganization plan becomes effective at the end of sixty calendar days of continuous session of Congress unless *either* house passes a resolution stating its disfavor with the plan.

While these procedures are fundamentally the same as the 1949 Act mechanism, the 1977 Act makes a number of significant changes from former law. Added to the statute is the congressional

---

56. 67 Stat. 4 (1953); 69 Stat. 14 (1955); 71 Stat. 611 (1957); 75 Stat. 41 (1961); 78 Stat. 240 (1964); 79 Stat. 135 (1965); 80 Stat. 393 (1966); 81 Stat. 220 (1967); 82 Stat. 1367 (1968); 83 Stat. 6 (1969); 85 Stat. 819 (1971).

57. See Appendix 2 (Action Taken on Reorganization Plans Under Authority of Reorganization Statutes, 81st—93rd Congresses), H.R. REP. NO. 95-105 to accompany H.R. 5045, Reorganization Act of 1977, 95th Cong., 1st Sess. (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 491. 58 H.R. REP. NO. 95-105, 95th Cong., 1st Sess. 5-6 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 491; While only 20 plans were rejected, the resolutions of disapproval were introduced in at least one house of Congress in 61 of the 93 plans. And Congressional votes were taken in 51 of the 93 plans with rejection occurring in 20 such cases.

58. See Berg, *Lapse of Reorganization Authority*, 35 PUB. AD. REV. 195 (1975).

59. See, e.g., S. 936, 93d Cong., 1st Sess., 119 CONG. REC. 4788 (1973), introduced by Senator Robert Byrd of West Virginia, which would require an affirmative vote of both Houses in approving a plan, as well as advance notification of reorganization studies and plans to be submitted. See also THE EXECUTIVE REORGANIZATION ACT: A SURVEY OF PROPOSALS FOR RENEWAL AND MODIFICATION (American Enterprise Institute for Public Policy Research, 1977).

Presidential candidate Jimmy Carter seized upon the absence of reorganizational authority as an issue and it became a major theme of the Carter campaign. See note 11 *supra*. See also M. SCHRAM, RUNNING 91-92 (1977). Carter stressed reorganization as an economy measure and relied upon his experience with reorganization in Georgia in 1971. See text accompanying notes 144 through 151 *infra*.

60. 5 U.S.C.A. §§ 901-913 (West, Supp. 1977).

61. Within 3 weeks of his inauguration, President Carter had sought reorganization authority from Congress. Exec. Comm. 596, 123 CONG. REC. S2319 (daily ed. Feb. 4, 1977); Exec. Comm. 668, 123 CONG. REC. H936 (daily ed. Feb. 7, 1977).

desire that the President shall provide appropriate means for citizen advice and participation in executive reorganization.<sup>62</sup> Certain parts or functions of an agency may not be eliminated,<sup>63</sup> and the abolition of any "enforcement function or statutory program" is prohibited.<sup>64</sup>

The provision under the 1949 Act that no more than one reorganization plan could be submitted to Congress within any period of thirty days has been modified to provide that no more than three plans may be pending before Congress at any one time.<sup>65</sup> Under the prior law the President was required to estimate any reduction in expenditures that might result from a reorganization plan. The 1977 Act adds the requirement that the President not only estimate any reduction but also estimate any increase in expenditures which may result from a plan.<sup>66</sup>

More significantly, the 1949 Act prohibited Congress from making any change in a reorganization plan which had been submitted. It could only be rejected by resolution. The 1977 Act provides that during the thirty days after a plan has been submitted to Congress, but before a resolution of disapproval has been reported by the reviewing committee to the full House or Senate, the President may make amendments or modifications which would then be treated as part of the original plan. These changes would not affect the time limits provided in the legislation.<sup>67</sup>

---

62. 5 U.S.C.A. § 901(c) (West Supp. 1977) provides: "It is the intent of Congress that the President should provide appropriate means for broad citizen advice and participation in restructuring and reorganizing the executive branch."

63. *Id.* at § 905(a).

64. *Id.* at § 903(a)(3).

Examples of enforcement functions are law enforcement, civil rights protection, the collection of taxes and duties and the variety of inspections performed by Government agencies. Statutory programs are those created by act of Congress directing the President or Government agencies to carry out activities for the well being and benefit of the public. A few examples would include environmental protection, social security, veterans programs, health and welfare activities (including Public Health Service hospitals), school lunch programs, agricultural support programs, among many others. The committee is not making a judgment on the merits of any programs, but feels that if they were created by congressional legislation, they should only be abolished in the same way.

H.R. REP. No. 95-105, 95th Cong., 1st Sess. 6-7 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 496.

65. 5 U.S.C.A. § 903(b) (West Supp. 1977).

66. *Id.* at § 903(b).

67. *Id.* at § 903(c). In addition, the President may withdraw a plan prior to the conclusion of the 60 day period. The 1977 Act also changes significantly the status of independent regulatory agencies under reorganization plans. The whole of independent regulatory agencies or any of their functions may not be abolished or transferred nor may two or more of such agencies or their functions be consolidated. *Id.* at § 905(a)(1).

Under the expired reorganization authority, independent regulatory agencies were treated as other agencies in the executive branch, and they were subject to reorgani-

zation in the same manner. The bill recognizes the unique status of independent regulatory agencies and their special relationship to the Congress by providing that the whole of independent regulatory agencies or all of their functions may not be abolished or transferred nor may two or more such agencies or all their functions be consolidated. This does not mean that such agencies are totally exempt from reorganization authority, but such authority is limited as described heretofore.

H.R. REP. NO. 95-105, 95th Cong., 1st Sess. 8 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 497. A plan may also become effective prior to the expiration of the 60 day period if both houses of Congress have voted upon and defeated a resolution of disapproval. While no vote by Congress was insured on any particular plan of reorganization under the prior law, the 1977 Act will require such Congressional consideration. To assure the filing of a resolution of disapproval in each house, the Chairman of the Committee on Government Operations in the House, and the Chairman of the Committee on Governmental Affairs in the Senate, or any member designated by such chairmen, shall introduce a resolution of disapproval on reorganization plan when it is transmitted to the Congress but no later than the first day of the session following such transmittal. 5 U.S.C.A. § 910(a) (West Supp. 1977).

Pursuant to this new authority, President Carter announced the creation of special task forces within the government to begin reorganizational processes. Four initial areas of review were Administrative Services Delivery, Federal Law Enforcement, Human Services Programs, and Local Development Programs. N.Y. Times, June 30, 1977, at 12, col. 3; 42 Fed. Reg. 33,909, 33,911, 33,913, 33,915 (1977). President Carter later announced the reorganization of federal agencies and programs dealing with natural resources and the environment. Wall St. J., August 3, 1977, (Midwest Ed.) at 3, col. 3; 42 Fed. Reg. 43,957 (1977). In yet another announcement, reorganization efforts have been announced in the areas of federal economic analysis and policy machinery, federal preparedness and response to disasters, federal food and nutrition policy, the federal justice system, and the federal government's legal representation system. N.Y. Times, August 27, 1977, at 2, col. 5; 42 Fed. Reg. 43,375, 43,377, 43,379, 43,381, 43,383 (1977).

Through a request for public comment, the Office of Assistant to the President for Reorganization has attempted to fulfill the Congressional intent set forth in 5 U.S.C.A. § 901(c) (West Supp. 1977). The request described the Carter programs in this manner: "His goal is to streamline the government, making it more competent to serve the people." 42 Fed. Reg. 34,958 (1977). Comments were solicited on the following general reorganization issues:

Which Federal departments and agencies are most in need of reexamination?

What tasks does the Federal government perform especially well? What tasks does it perform poorly?

Do you have specific examples of governmental programs that are failing to accomplish their purposes because they are improperly organized or managed? Can you suggest programs that are succeeding on the basis of proper organization?

What general standards would you recommend to evaluate the merits of any federal reorganization proposal? Examples might include improved service, reduced costs and paperwork.

What methods can you suggest for involving citizens in the federal reorganization effort on a continuing basis?

An effort to attain the various reorganization objectives listed on the preceding page will inevitably involve trade-offs. Where these are necessary, to which objectives would you attach the highest priority?

*Id.*

Comments also were solicited on particular areas of government including general government, human resources, civil rights enforcement, national security and international affairs, natural resources, environmental energy, economic development, regulatory reform and federal personnel management. *Id.* at 34,958. This request for public comment was picked up by several newspapers. *See, e.g.,* "Carter Considers Options to Cut Executive Staff 30%," Chi. Sun-Times, July 8, 1977, at 18, col. 4.

On July 15, 1977, President Carter submitted Reorganization Plan No. 1 of 1977 to Congress.<sup>68</sup> It is designed to reorganize the Executive Office of the President. This reorganization has been viewed primarily as an economy measure, eliminating many White House units and cutting the White House work force by over 28%, a reduction in White House jobs from 485 to 351.<sup>69</sup> Reorganization Plan No. 1 called for the elimination of the Domestic Council, Council on International Economic Policy, Office of Telecommunications Policy, Federal Property Council, Office of Drug Abuse Policy, Energy Resources Council and the Economic Opportunity Council.<sup>70</sup> Hearings were held in both the House and the Senate and resolutions of rejection were entered in both houses.<sup>71</sup> An amended Reorganization Plan No. 1 became effective October 19, 1977 after the House of Representatives voted 350-20 against a resolution of disapproval.<sup>72</sup>

#### THE STATE EXPERIENCE

The 1949 Reorganization Act has served as the model for state executive reorganization authority. Since 1963, at least seven states, in addition to Illinois, have adopted constitutional provisions authorizing reorganization through executive initiative.<sup>73</sup> A number of other states, beginning with New Hampshire in 1949, have developed statutory mechanisms permitting this form of reorganization.<sup>74</sup>

68. H.R. Doc. No. 95-185, 95th Cong., 1st Sess. (1977).

69. See 123 CONG. REC. H7231 (daily ed. July 15, 1977); N.Y. Times, July 16, 1977, at 21, col. 5; N.Y. Times, July 16, 1977, at 22, col. 5.

70. The Council on Environmental Quality also appeared to have been an agency to be eliminated through reorganization. However, after considerable lobbying pressure this agency was left undisturbed. See editorial "No R.I.P. for the C.E.Q.," N.Y. Times, July 6, 1977, at 26, col. 1. See also N.Y. Times, July 7, 1977, at 16, col. 3; at 1, col. 6. Walczak, *Reorganization Loses Out to Politics*, BUSINESS WEEK 22 (August 1, 1977). Pressures were also exerted to retain or dismantle other agencies undergoing reorganizational review. See Wall St. J. (Midwest ed.), August 26, 1977, at 1, col. 6, discussing review of federal equal employment laws.

71. H.R. Res. 688, 95th Cong., 1st Sess., (1977), 123 CONG. REC. H7333 (daily ed. July 18, 1977); S. Res. 222, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S12084 (daily ed. July 18, 1977).

72. H.R. Res. 688, 95th Cong., 1st Sess. (1977), 123 CONG. REC. H11014 (daily ed. October 14, 1977). No Senate action was taken on S. Res. 222. See S. Rep. No. 95-465, 95th Cong., 1st Sess. (1977); and H.Rep. 95-661, 95th Cong., 1st Sess. (1977).

On October 12, 1977, President Carter introduced Reorganization Plan No. 2 of 1977 to consolidate certain international communication, educational, cultural and broadcasting activities of the United States government. 123 CONG. REC. S17052 (daily ed. October 12, 1977); 123 CONG. REC. H10840 (daily ed. October 12, 1977). A resolution of disapproval has been introduced in the Senate, S. Res. 293, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S17116 (daily ed. October 13, 1977), and House, H. Res. 827, 95th Cong., 1st Sess. (1977), 123 CONG. REC. H10878 (daily ed. October 12, 1977). On November 29, 1977, the House voted 357-34 against a resolution of disapproval. 123 CONG. REC. H12481 (daily ed. November 29, 1977).

73. ALAS. CONST. art. III, § 23; KAN. CONST. art. I, § 6; MD. CONST. art. II, § 24; MASS. CONST. art. LXXXVII; MICH. CONST. art. V, § 2, N.C. CONST. art. III, § 5(10); S.D. CONST. art. IV, § 8.

74. 1949 N.H. Laws ch. 43, §§ 1 *et seq.* See text accompanying notes 127 through 143 *infra*.

### *State Constitutional Authority*

Seven states have constitutional provisions authorizing reorganization of executive branch agencies, departments, boards, and commissions by gubernatorial initiation.<sup>75</sup> All of these constitutional authorizations provide for reorganization by means of executive order.<sup>76</sup> However, none of these grants are beyond the control of the various state legislatures.<sup>77</sup> The constitutions of three states require that executive agencies and boards be allocated among no more than a specified number of "principal" departments.<sup>78</sup> This numerical limitation reflects the strong impact of the National Municipal League's Model State Constitution on executive reorganization development.<sup>79</sup> Under the constitutions of these seven states and Illi-

75. See note 76 *infra*. The constitutions of at least five other jurisdictions have provisions colorably dealing with executive reorganization. See IDAHO CONST. art. IV, § 20; LA. CONST. art. IV, § 1(c); MO. CONST. art. IV, § 12; MONT. CONST. art. VI, § 7; N.Y. CONST. art. V, § 2. Typical of these constitutional sections is the Missouri provision which limits to no more than 14 the number of principal executive departments, specifies what 13 of those agencies shall be called, grants the legislature the power to create the remaining authorized department, and further provides that

all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by law or by the governor as provided by law to the office of administration or to one of the fourteen administrative departments to which their respective powers and duties are germane.

MO. CONST. art. 4, § 12 (adopted at special election August 8, 1972) (emphasis supplied). The Missouri General Assembly had previously enacted legislation providing for gubernatorial reorganization by executive order subject to legislative disapproval. MO. REV. STATS., §§ 26.500-540 (1967).

For purposes of this article, any constitutionally-provided for reduction in the number of elected state officials—the "short-ballot" issue—is not analyzed as an executive reorganization issue because of the absence of the executive's initiative in such reductions. See, e.g., OKLA. CONST. art. VI, §§ 1, 3, 4, 19, 20 and 25 (adopted at election held July 22, 1975 and effective January 8, 1979), which provide for the consolidation and elimination of five of thirteen elective state officers.

Additionally, since the constitutions of Idaho, Louisiana, Montana and New York entrust the responsibility for executive reorganization to the legislative branch rather than to the governors of these states, these sections are also not analyzed in this article.

76. See, e.g., ALAS. CONST. art. III, § 23; ILL. CONST. art. V, § 11; KANS. CONST. art. I, § 6; MD. CONST. art. II, § 24; MASS. CONST. art. LXXXVII; MICH. CONST. art. V, § 2; N.C. CONST. art. III, § 5(10); S.D. CONST. art. IV, § 8.

77. See authorities cited in note 76 *supra*.

78. ALAS. CONST. art. III, § 22; MICH. CONST. art. V, § 2; S.D. CONST. art. IV, § 8.

79. MODEL STATE CONSTITUTION, 6th Ed., (1968), National Municipal League, § 5.06 provides:

All executive and administrative offices, agencies and instrumentalities of the state government, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies established by law may, but need not, be allocated within a principal department. The legislature shall by law prescribe the functions, powers and duties of the principal departments and of all other agencies of the state

nois, an executive order providing for reorganization which modifies or changes existing law becomes effective within a fixed period of time, unless the legislature explicitly rejects the proposal.<sup>80</sup> Legislative disapproval is usually allowed by an absolute majority of either chamber, except in Alaska and Michigan where disapproval of a governor's executive reorganization plan must be voted by an absolute majority of the members of both houses.<sup>81</sup>

Only those constitutional provisions which mandate a fixed number of principal departments immunize gubernatorially-developed reorganization plans from subsequent "re-reorganization" by the legislative branch. In those states which limit state executive agencies in this manner, the governor still enjoys considerable flexibility in reassigning functions among and between agencies for administrative convenience.

The difficulty of amending a constitutional grant of executive reorganization power—as opposed to the relative ease by which a hostile legislature could revoke a statutory grant of reorganization authority to a governor—is the significant difference between constitutional and statutory<sup>82</sup> authorizations of reorganization authority.<sup>83</sup>

Decisions have been reported construing four of these constitutional provisions,<sup>84</sup> which may be relevant to the construction of article V, section eleven of the 1970 Illinois constitution.

and may from time to time reallocate offices, agencies and instrumentalities among the principal departments, may increase, modify, diminish or change their functions, powers and duties and may assign new functions, powers and duties to them; but the governor may make such changes in the allocation of offices, agencies and instrumentalities, and in the allocation of such functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the legislature while it is in session, and shall become effective, and shall have the force of law, sixty days after submission, or at the close of the session, whichever is sooner, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members.

There appears to have been little support for such a numerical limitation on principal departments at the Sixth Illinois Constitutional Convention. *See* note 211 *infra*.

80. ALAS. CONST. art. III, § 23 (60 days of a regular session); ILL. CONST. art. V, § 11 (60 days); KANS. CONST. art. I, § 6 (60 days); MD. CONST. art. II, § 24 (50 days); MASS. CONST. art. LXXXVIII (60 days); MICH. CONST. art. V, § 2 (60 days); N.C. CONST. art. III, § 5(10) (60 days); S.D. CONST. art. IV, § 8 (90 days).

81. ALAS. CONST. art. III, § 23; MICH. CONST. art. V, § 2.

82. *See* text accompanying notes 135 through 184 *infra*.

83. *See* Comments of Constitutional Convention Delegate Netsch, RECORD OF PROCEEDINGS, 6th ILLINOIS CONSTITUTIONAL CONVENTION, vol. 5 at 3751 (1969-70) [hereinafter cited as RECORD OF PROCEEDINGS].

84. The constitutional reorganization provisions of three states, Maryland, Massachusetts and North Carolina, have not been the subject of any reported case law.

The Maryland constitutional executive reorganization provision was ratified by the Mary-

land voters in November, 1970. MD. CONST. art. II, § 24. The governor is allowed to "make changes in the organization of the Executive Branch" including the creation and abolition of agencies and departments and the reassignment of functions and powers. *Id.* When such changes "are inconsistent" with state law or "create new governmental programs," they must be set out in an executive order presented to the Maryland General Assembly within the first ten days of one of its regular sessions. *Id.* The executive order becomes effective in 50 days unless expressly disapproved by an absolute majority of either house of the General Assembly. The executive's prerogative is limited to the executive branch and has no authority over constitutionally-created offices, powers or duties. There is no reported case law construing this provision, despite the inviting vagueness surrounding what constitutes a reorganization which creates "new governmental programs."

Sections 1 and 2 of article LXXXVII of the Massachusetts Constitution provide a method for gubernatorial reorganization. MASS CONST. art. LXXXVII, §§ 1-2. Under these provisions, the governor may present to the legislature reorganization plans "transferring, abolishing, consolidating or coordinating" executive agencies, after having prepared one or more such plans. *Id.* at § 1.

Once the reorganization plan is presented to the legislature, such plan must be referred to an appropriate committee, which must hold public hearings on the plan and report within 10 days of such hearing either its approval or disapproval thereof. Reorganization plans that are not disapproved within 60 days after their presentation to the General Assembly shall have the force and effect of law. No reorganization plan is subject to amendment by the Massachusetts legislature, *id.* at § 2(b). Nonetheless, the framers of these constitutional provisions felt it necessary to assert affirmatively that issues affecting civil service status, seniority, retirement, and other rights of state employees, are within the domain of the legislative branch in all cases. *Id.* at § 2(c).

In November, 1970, referendum voters in North Carolina approved subpart 10 of § 5, article III of the Constitution of North Carolina, providing for administrative reorganization. By this provision, the General Assembly is granted power to prescribe powers, duties and functions of executive agencies, with the governor of the state permitted to "make such changes in the allocation . . . of those functions, powers, and duties as he considers necessary for efficient administration." N.C. CONST. art. III, § 5(10). When such changes affect existing law, they must be submitted to the legislature by means of executive order and such order becomes effective unless specifically disapproved by either house of the North Carolina General Assembly. *Id.* An interesting aspect of this provision is that a joint resolution of both houses of the North Carolina General Assembly can *modify* a reorganization plan as submitted by the Governor. *Id.*

One recent North Carolina chief executive commented in this manner on the reorganizational process:

All governments tend to set up agencies and divisions within departments in order to spotlight problems and aim appropriations right at a problem that may have momentarily captured public attention. Legislators constantly introduce bills to set up new departments, upgrade current departments, break them up, rename them, reshape their emphasis, and redefine their goals. The result is recurring overlap and duplication; a loss of focus as programs are dribbled out through too many agencies. The inevitable scenario is familiar: advisory committees, committees for cooperation, and joint committees for communication between agencies.

Reorganization is in the first instance a management problem, typically the function of executives whether in business or government. A governor should not be forced to toss reorganization into the legislative mill with the rest of his requests because there will always be higher priorities in his legislative program. It is too easy to say "Let's limp along a little longer" for something as colorless as reorganization of government.

For effective coordination instead of proliferation of state agencies and departments, constant and clean-cut regroupings are needed. Experience has shown it to be difficult, if not impossible, to accomplish needed regroupings by sporadic legislative act. Government becomes unmanageable as it grows. The governor's authority is the counterforce to bring order into the process.

## Alaska

The Alaska Constitution requires that all executive and administrative departments be allocated within not more than twenty principal departments, specifically exempting from this limitation "regulatory, quasi-judicial, and temporary" agencies created by statute.<sup>85</sup> The Alaska legislature's rejection of any reorganization must be effectuated in joint session, within sixty days of the plan's submission.

In a taxpayer's action attacking the constitutionality of legislation creating the Alaska State Mortgage Association, the Supreme Court of Alaska held that the mortgage association was a state instrumentality within the Department of Commerce and that its creation was not violative of the constitutional requirement that executive agencies be allocated among not more than twenty principal departments.<sup>86</sup> The taxpayer contended that the mortgage association was not subject to such executive control that would justify the conclusion that the Alaskan legislature placed the association "firmly within the Department of Commerce."<sup>87</sup> Relying on an earlier decision concerning the legislature's creation of a public corporation within an executive department,<sup>88</sup> the court found the requirement of submitting annual financial reports to the governor, and the Commissioner of Commerce's permanent seat on the board of the Association to be indicia of executive control.<sup>89</sup>

While Illinois does not have a limitation on the total number of executive departments permitted, the question of what agencies "are directly responsible" to its governor—and thus susceptible to executive reorganization—is unsettled in Illinois. The reasoning of the Alaska court could be utilized in any judicial treatment of the issue.<sup>90</sup>

---

For a governor to have to make reorganization a part of his legislative program, when he is already overburdened with substantive programs and legislative messages, simply means that reorganization will be delayed until next term or passed on to the next governor, who, faced with the same problems, seldom gets time for reorganization.

T. SANFORD, *STORM OVER THE STATES* 194-95 (1967)

85. ALAS. CONST. art. III, § 22.

86. *Walker v. Alaska State Mortgage Ass'n*, 416 P.2d 245 (Sup. Ct. Alas. 1966).

87. *Id.* at 249.

88. *See DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717 (Sup. Ct. Alas. 1962), where the court held that the creation of the Alaska State Development Corporation did not violate ALAS. CONST. art. III, § 22.

89. *Id.* at 250.

90. *See also Wellmix, Inc. v. City of Anchorage*, 471 P.2d 408 (Sup. Ct. Alas. 1970). In *Wellmix*, the City of Anchorage was held not to be an office, department or agency of the executive branch within the meaning of the executive reorganization portion of the constitution.

## Kansas

The Kansas Constitution contains practical administrative features not found in Illinois and other state constitutional reorganization frameworks. For example, the Kansas Constitution provides for a smooth reordering of the fiscal management and budgets of the departments affected by reorganization, and further requires the publication of reorganizational executive orders alongside legislative enactments.<sup>91</sup> Features of the constitution include the grant to the governor of the power to abolish, transfer, consolidate and coordinate any state agency. In *Van Sickle v. Shanahan*,<sup>92</sup> this executive reorganization power was the subject of a constitutional challenge, based primarily upon the "guaranty" clause of the United States Constitution.

The plaintiffs in *Van Sickle* mounted an attack on the very substance of the concept of executive reorganization.<sup>93</sup> Plaintiffs, a former state treasurer and the current state treasurer and auditor, challenged the constitutionality of the elimination of their offices as statewide elective positions, alleging a violation of the republican form of government guaranteed by article IV, section four of the United States Constitution.<sup>94</sup> In a lengthy opinion, the Supreme Court of Kansas articulated the "decisive question"<sup>95</sup> to be whether

the provisions of Article IV, § 4 of the United States Constitution . . . require the conclusion that the doctrine of separation of powers is an inherent concept of a republican form of government, and is a guarantee to the people of the states that the powers inherently belonging to one department may not be vested by the people in another department of that government.<sup>96</sup>

According to the court, the guarantee to each state of a republican form of government was intended to protect the people of the states "against aristocratic and monarchical innovations" and against insurrection and domestic violence, and to prevent them from abolishing a republic form of government.<sup>97</sup> With respect to the more perti-

---

91. KAN. CONST. art. I, §§ 6(b) and (d). See discussion at note 315 *infra*.

92. 212 Kan. 426, 511 P.2d 223 (1973).

93. *Id.* at 432-34, 511 P.2d at 229-31. The court also considered and rejected the defendant's argument that all cases arising under the "guaranty clause" were political and therefore nonjusticiable. *Id.* at 434-38, 511 P.2d at 231-35. Defendants also unsuccessfully argued that in submitting issues to the public for referendum vote each separate subject matter must be separately voted upon by the referendum voters. *Id.* at 433-34, 511 P.2d at 230-31.

94. The guaranty clause provides that "[t]he United States shall guarantee to every state in the union a republican form of government. . . ." U.S. CONST. art. IV, § 4.

95. 212 Kan. at 440, 511 P.2d at 235.

96. *Id.*

97. *Id.* at 444, 511 P.2d at 238. This conclusion is based on a scholarly discussion of James

ment issue as to whether or not the reorganization provision vested legislative power in the governor of Kansas, the court determined that it did.<sup>98</sup> In so concluding, the court noted that the reorganization procedure is "an innovation . . . based upon the theory that reorganization of the executive department is first and foremost a responsibility of the governor. . . ."<sup>99</sup> Despite this acknowledgement, the court found that the reorganization provision did not conflict with the federal "guaranty" clause.<sup>100</sup> In its resolution of this issue, the court referred to the various legislative limitations on the executive's power to reorganize as the basis for allowing the provision to stand.<sup>101</sup> In its view, the integrity of the republican form of government was preserved by the fact that the legislature was not unduly restricted by executive prerogatives allowed under the constitutional provision.

Despite the outcome in *Van Sickle*, the "guaranty clause" argument is an interesting one. Given the proper mix of political factors, a state court might be persuaded to strike down even a constitutionally guaranteed power of executive reorganization, should it appear that an executive, not hampered by an unfriendly or uncooperative legislature, was extending his authority too extensively into the domain of the legislative branch.<sup>102</sup>

---

Madison's notes on the debates of the federal constitutional convention and the resolutions presented thereto. See "Debates in the Federal Convention of 1787," H.R. Doc. No. 398, 69th Cong., 1st Sess. (1926) entitled "Documents Illustrative of the Formation of the Union of the United States of America," cited at 212 Kan. at 441, 511 P.2d at 236, and on Madison's Federalist Papers, including the discussions therein regarding Montesquieu's theories regarding the doctrine of separation of powers. See "The Spirit of the Law," Thatcher Edition, *THE IDEAS THAT HAVE INFLUENCED CIVILIZATION* 35, cited at 212 Kan. at 445, 511 P.2d at 239.

98. *Van Sickle v. Shanahan*, 212 Kan. 426, 447-48, 511 P.2d 223, 241 (1973).

99. *Id.*

100. *Id.* at 449-50, 511 P.2d at 242.

101. The Kansas Supreme Court noted:

While the amendment authorizes the governor to initiate reorganization orders . . . it also places important substantive limitations upon the chief executive. No reorganization proposal can attempt to change the legislative or the judicial branches, or any of their functions, and no plan can seek to alter the constitutionally delegated functions of state officers and state boards. Likewise, reorganization orders cannot deprive the Legislature of its constitutional authority to organize or reorganize the executive branch and assign functions to it on terms of its own choosing. More important, no reorganization proposed under any order can have the effect of adding to executive functions, extending agencies or functions beyond their scheduled expiration date, requiring additional revenues or appropriations, or changing the substance of state-local relationships, which limitations are sometimes provided explicitly and are always present by inference.

*Id.* at 448, 511 P.2d at 241-42.

102. See ILL. CONST. art. II, § 1 (1970) which states: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." The justiciability issue discussed in *Van Sickle* suggests an interesting basis for

## Michigan

The 1963 Michigan Constitution provides that all executive and administrative departments and agencies must be grouped *by law* among no more than twenty principal departments, organized according to major governmental purposes.<sup>103</sup> Subsequent to the initial statutory allocation, the governor may, by executive order, make such further changes in the organization of that executive branch which "he considers necessary for efficient administration."<sup>104</sup> When these changes require the force of law, they are to be submitted to the legislature by executive order.

Within sixty days of its submission, both houses of the legislature must disapprove the executive order by absolute majorities; otherwise, the executive order has the force and effect of law.<sup>105</sup>

In 1968, the provisions of this article were held non-self-executing by the Michigan Supreme Court in *McDonald v. Schnipke*,<sup>106</sup> which involved a challenge by the appointed Michigan Adjutant General following the governor's attempt to remove him from that position. The challenge was successful and a writ of *quo warranto* issued on the court's determination that the Michigan constitution required affirmative action by the legislature to effectuate the initial allocation of functions among twenty executive agencies. The court held that the failure of the legislature to act within the required two year limitation permitted the executive to take the necessary reorganization action.<sup>107</sup> However, the governor had assumed unauthorized responsibilities with respect to the Adjutant General's position prior to the effective date of his Executive Reorganization Act<sup>108</sup> which provided for a reorganized Department of Military Affairs. Hence, the court upheld the legislature's significant role in executive reorganization in Michigan despite the concomitant power granted the governor by the constitution.<sup>109</sup>

---

opposing any challenge to a constitutional or statutory executive reorganization. See note 93 *supra*. To a court facing a "guaranty clause" argument and unwilling to adjudicate such an executive-legislative branch dispute, the argument that any such challenge was a political question and therefore not justiciable could be persuasive.

103. MICH. CONST. art. V, § 2. See text accompanying note 78 *supra*. See also In re Opinion of the Justices, 87 S.D. 114, 203 N.W.2d 526 (1973), discussed at text accompanying notes 114 through 119 *infra*.

104. MICH. CONST. art. V, § 2.

105. *Id.*

106. 380 Mich. 14, 155 N.W.2d 169 (1968).

107. *Id.* at 25, 155 N.W.2d at 174.

108. MICH. COMP. LAWS ANN. §§ 16.1 *et seq.* (1965).

109. In another case which construed executive reorganization portions of the Michigan Constitution, the Michigan Supreme Court held that under the Hospital Finance Authority Act, MICH. STAT. ANN. § 14.1220(1) (1965), placement of the state hospital finance authority

### South Dakota

Like that of Michigan, the South Dakota Constitution mandates the allocation, by law, of executive and administrative agencies into not more than twenty-five principal departments.<sup>110</sup> The governor may also make changes in the organization of these departments to provide for efficient administration. If such changes "affect existing law," the governor must submit them to the legislature by executive order which shall have the force of law if not disapproved by an absolute majority of either house of the legislature.<sup>111</sup>

Under the South Dakota Constitution the governor may request an advisory opinion from the state's supreme court when the request is "of [the] utmost solemn occasion involving the duties of [the governor's] office."<sup>112</sup> On three separate occasions since the adoption of the reorganization provision in November, 1972, the South Dakota executive has requested an advisory opinion relating to the gubernatorial reorganization of the executive branch.<sup>113</sup>

within the Department of Treasury was a proper exercise of the legislature's discretion. *W.A. Foote Memorial Hosp. v. City of Jackson Hosp. Auth.*, 390 Mich. 193, 211 N.W.2d 649 (1973). Furthermore, the court held that the Act did not create a new principal department of state government contrary to the constitutional provision restricting the number of such departments. *Id.* at 213-14, 211 N.W.2d at 657.

110. S.D. CONST. art. IV, § 8.

111. *Id.*

112. S.D. CONST. art. V, § 5.

113. *In re Opinion of the Justices*, 87 S.D. 114, 203 N.W.2d 526 (1973); *In re Opinion of the Supreme Court Relative to Executive Order 73-1*, 87 S.D. 156, 204 N.W.2d 184 (1973); *In re Opinion of the Supreme Court, Relative to Section 52 of Executive Order 73-1*, 87 S.D. 399, 209 N.W.2d 668 (1973).

In the final set of issues presented the supreme court, the court declined on a unanimous basis to consider a question involving the governor's power to transfer agencies from another constitutional office (that of Attorney General) to a gubernatorial office. *In re Opinion of the Supreme Court, Relative to Section 52 of Executive Order 73-1*, 87 S.D. 399, 209 N.W.2d 668 (1973). Stating that the request was not "a solemn occasion within the meaning of Article 555 of the Constitution," the court held that the dispute could be much more expeditiously determined by an adversary proceeding. *Id.* at 403, 209 N.W.2d at 671. The question presented involved a portion of an executive order effectuating reorganization whereby "the office of commissioner of consumer affairs . . . is hereby transferred . . . to the division of consumer protection of the department of commerce and consumer affairs." *Id.* at 400, 209 N.W.2d at 669. The Office of Commissioner of Consumer Affairs had been within the office of the State Attorney General, a constitutional office. Not unexpectedly, the Attorney General had issued an opinion that the office could not be removed from his department by such an executive order. The governor's argument, as articulated in this brief opinion, was that the wording of the constitutional provision, "[e]xcept as to elected constitutional officers, the Governor may make such changes in the organization of offices. . ." *id.* at 400, 209 N.W.2d at 669 (emphasis added), created an administrative division out of a constitutional office as compared to affecting the duties, powers, or responsibilities of a constitutional officer, the former being permissible within a strict reading of the constitutional provision. However, the court declined to answer the inquiry. One wonders if this were simply the court's way of avoiding a political imbroglio between the governor and the attorney general. The

In the first request, the Supreme Court declined to answer two of the three questions posed by the governor.<sup>114</sup> The court did consider whether the authorization to the legislature to consolidate all then-existing executive departments into not more than twenty-five principal departments<sup>115</sup> prevented the governor from doing the same by executive order pursuant to the power granted him under the same constitutional provision. The court concluded that "the powers granted the Governor in the second paragraph are not dependent on or limited by the power granted or the exercise or non-exercise of the power to allocate given in the first paragraph. . . ."<sup>116</sup> In other words, the governor was permitted to effectuate reorganization into twenty-five departments *prior* to the time that the legislature acted

---

court's decision that "their rights can be *expeditiously* determined in an adversary proceeding," *id.* at 403, 209 N.W.2d at 671 (emphasis added), seems to be an overstatement in the sense that the court had the power at that time to resolve the matter, but determined it should not do so.

114. In re Opinion of the Justices, 87 S.D. 114, 116, 203 N.W.2d 526, 527 (1973), raised an unanswered question as to whether or not the governor could transfer an agency or function "created and attached by statute to a constitutional office from that office to a principal department within the executive branch." The precise language of the constitutional provision involved was as follows: "*Except as to elected constitutional officers, the Governor may make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as he considers necessary for efficient administration.*" S.D. CONST. art. IV, § 8. (emphasis added).

The second question the supreme court left undecided concerned whether, if such an executive order involving other constitutional officers became effective and had the force of law, it would allow the head of an agency previously transferred from a constitutional office to be appointed by the governor. *Id.* at 121, 203 N.W.2d at 527.

115. S.D. CONST. art. IV, § 8 reads in its entirety as follows:

Section 8. REORGANIZATION.

All executive and administrative offices, boards, agencies, commissions and instrumentalities of the state government and their respective functions, powers and duties, except for the office of Governor, lieutenant governor, attorney general, secretary of state, auditor, treasurer, and commissioner of school and public lands, shall be allocated by law among and within not more than twenty-five principal departments, organized as far as practicable according to major purposes, by no later than July 1, 1974. Subsequently, all new powers or functions shall be assigned to administrative offices, agencies and instrumentalities in such manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a principal department.

Except as to elected constitutional officers, the Governor may make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the Legislature within five legislative days after it convenes, and shall become effective, and shall have the force of law, within ninety days after submission, unless disapproved by a resolution concurred in by a majority of all the members of either house.

(emphasis added)

116. 87 S.D. at 118, 203 N.W.2d at 528.

in that regard. The court determined that the two paragraphs of the reorganization article were to be read as separate and distinct grants of reorganization authority—one to the legislature and one to the governor. In reaching this conclusion the court relied on the history of article IV, section eight. The court pointed out that the South Dakota legislature explicitly excluded the clause found in the Michigan Constitution's reorganization provision reading "subsequent to the initial allocation."<sup>117</sup> The exclusion of this phrase is significant since most other aspects of the Michigan reorganization article were adopted in South Dakota.<sup>118</sup>

A dissenting opinion by two of the five members of the South Dakota court argued that the governor's power to reorganize became operative only after the legislature's initiatives in this area had been completed, but no later than the date specified in the constitutional provision.<sup>119</sup>

In the governor's second set of questions to the supreme court, the issue raised was whether or not language stating that gubernatorial alterations "affect[ing] existing law, . . . shall be set forth in executive orders" meant that substantial structural reorganization of the entire state government by means of a single executive order was an unconstitutional or otherwise invalid exercise of the executive power granted. Stated simply, did the use of the plural "orders" in the constitutional provision prohibit the governor from reorganizing state government by one extensive executive order?<sup>120</sup> In one executive order the governor had allocated the entire executive branch among sixteen principal departments—certainly an extensive and undoubtedly complicated executive order which effectuated a number of changes.

The same three-member majority held that "the exercise of this power may be by a single order or more than one order."<sup>121</sup> One of the previous dissenting justices determined that the exercise of executive reorganization must "be embodied in [as many] separate executive orders"<sup>122</sup> as are necessary to effectuate all the changes made by the governor with regard to his executive departments. This view indicated that the legislature should be provided an op-

---

117. *Id.* See text accompanying note 104 *supra*. See also *McDonald v. Schnipke*, 380 Mich. 14, 155 N.W.2d 169 (1968).

118. 87 S.D. at 114, 203 N.W.2d at 528.

119. *Id.* at 122-23, 203 N.W.2d at 530.

120. In re Opinion of the Supreme Court Relative to Executive Order 73-1, 87 S.D. 156, 157, 204 N.W.2d 184, 185 (1973).

121. *Id.* at 159, 204 N.W.2d at 186.

122. *Id.*

portunity to approve each aspect of reorganization on a case by case basis.<sup>123</sup> In other words, each order should be limited in scope and should deal with only a few issues to enable the legislature to scrutinize each change individually. Thus, the dissent articulated a more restrictive approach to the executive's power to reorganize, advocating the constant and close scrutiny of the legislature.

These South Dakota opinions illustrate contrasting views of the scope of executive and legislative powers under standard reorganization procedures. The majority opinions support the authority of the governor to initiate comprehensive reorganization plans, subject to legislative overview; the dissents urge a more aggressive legislative role. These cases—as well as those of the Alaska, Kansas, and Michigan supreme courts—fail to establish clear standards for the allocation of authority between the two branches of government. Additionally, as seen in the comparison of the Michigan and South Dakota constitutional reorganization sections, the express language of the grants largely controls this allocation of authority. In any event, the scant case law that has thus far construed constitutional reorganization provisions suggests various grounds of challenge to executive reorganizations, including those effected under Illinois' article V, section eleven.

### *State Statutory Authority*

In addition to those jurisdictions in which constitutional provisions authorize reorganization by executive order, a number of states have laws which provide for some manner of "executive reorganization." The statutes of concern here are those that permit the governor to take an affirmative and active role in such restructuring.<sup>124</sup> Of less interest are state statutory provisions in which the chief executive does not have significant authority—by executive

---

123. *Id.*

124. California (CAL. GOV'T CODE § 8523 (West 1974), §§ 12080 - 12080.3 (West 1967, 1968, 1971)), Georgia (1972 Ga. Laws, ch. 40-3526), Kentucky (KY. REV. STAT. § 12.025 (1974)), Missouri (MO. ANN. STAT. §§ 26.500 *et seq.* (Vernon 1969)), New Hampshire (1949 N.H. Laws ch. 43), New Jersey (N.J. STAT. ANN. §§ 52:14C-1 *et seq.* (West 1970)), Pennsylvania (PA. STAT. ANN. tit. 71, §§ 750-1 *et seq.* (1962 & Supp. 1977)), Vermont (VT. STAT. ANN., tit. 3, §§ 2001 *et seq.* (Purdon 1962 & Supp. 1977)) and Virginia (VA. CODE, ch. 1.1 §§ 2.1-8.1 *et seq.* (1977)).

In 1974, the Kentucky General Assembly granted the state's chief executive the power to reorganize the administrative functions of state government by executive order. KY. REV. STAT. § 12.025 (1974). This grant of reorganization power does not, however, feature the same type of legislative review provided in other states. Here, the governor may establish, alter, abolish or otherwise change the organization of any agency or statutory department, including the authority to change the name of a department. *Id.* at § 12.025(1)(a). The governor has a further responsibility to recommend legislation to the next general assembly, which must pass the legislation if the reorganization is to remain effective. *Id.* The Kentucky Attorney General

order or otherwise—to initiate restructuring, or which by their own terms, provide for reorganization.<sup>125</sup> These latter statutes are comparable to the 1917 Illinois reorganization which resulted in formulation of the Civil Administrative Code.<sup>126</sup> With emphasis on the case law construing state statutory provisions, and the potential relevance of such case law to the Illinois reorganization provision, several state statutory reorganization schemes will be considered.

### New Hampshire

In 1949, the New Hampshire General Court enacted a statutory plan authorizing the executive preparation and transmittal of reorganization plans to both houses of the legislature.<sup>127</sup> This authority was limited to an eight month period ending in early 1950. However, this statutory grant was never utilized, as the Supreme Court of New Hampshire, in an advisory opinion, declared essential portions of the Act to be unconstitutional.<sup>128</sup> The statute ordered the governor to make an examination of the executive branch organization to determine what changes were necessary.<sup>129</sup> The governor was then to prepare a reorganization plan or plans, and transmit them to both

---

has opined that an executive order of the governor effecting a reorganization of a department or agency is subject to legislative confirmation by the next session of the General Assembly, failing which the reorganization is terminated. *OP. ATT'Y GEN.* 69-662 (1969).

The Pennsylvania General Assembly adopted the "Reorganization Act of 1955," granting the governor of Pennsylvania the authority to prepare a reorganization plan or plans pertaining to the consolidation, coordination, abolition (if necessary), and reassignment of functions of various executive departments and agencies. *PA. STAT. ANN.* tit. 71, §§ 750-1 *et seq.* (Purdon 1962 & Supp. 1977). Upon submission to the Pennsylvania General Assembly, the reorganization plan must be approved by an absolute majority of each house of the General Assembly. A plan is not approved and implemented into law in the same manner as is provided in most other states. Rather than the plan being effective *unless disapproved*, it is effective only *upon* the approval of each house. The effective date of such reorganization is considered to be the date of the approval of the last of the two houses to act on the plan. *Id.* at § 750-7. The General Assembly must pass on the plan within 30 days after its submission.

By statute passed in 1969, the Vermont governor has the authority to make changes in the organization of the executive branch by executive order subject to the disapproval of either house of the general assembly. *VT. STAT. ANN.* tit. 41, § 2001-2 (1972 & Supp. 1977). In 1977 in Virginia the legislature granted executive reorganization powers to the governor. *VA. CODE* ch. 1.1, §§ 2.1-8:1 (1977). The governor is empowered to reorganize executive agencies through a plan which must be approved by a majority of members voting of both the Senate and the House of Delegates. *Id.* at §§ 2.1-8.3, 8.4, 8.6.

125. *See, e.g.*, Arkansas (*ARK. STAT. ANN.* ch. 9, §§ 5-901 *et seq.* (1947)), Colorado (*COLO. REV. STAT.* §§ 24-1-101 *et seq.* (1968)), Connecticut (*Pub. Law* 77-614, signed into law, June 2, 1977), Florida (*FLA. STAT. ANN.* §§ 20.01 *et seq.* (West 1969)), and Minnesota (*MINN. STAT. ANN.* § 15.015 (West 1977)); and South Carolina (*S.C. CODE.* §§ 1-19-10 *et seq.* (1976)).

126. *See* text accompanying notes 178 through 190 *infra*, discussing the Lowden Administration reorganization in 1917 in Illinois.

127. 1949 N.H. Laws ch. 43, §§ 1 *et seq.*

128. Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950).

129. 1949 N.H. Laws, ch. 43, § 2.

houses of the General Court, the New Hampshire legislature. The plan would be effectuated in the form of a statute, rather than an executive order,<sup>130</sup> and would become law upon the expiration of twenty-five legislative days following its submission to the General Court, "but only if . . . there has not been passed by the two houses a concurrent resolution stating in substance that the General Court does not favor the reorganization plan."<sup>131</sup>

The New Hampshire Supreme Court found that this provision violated the state's constitution because it dispensed with the requirement that every bill "which shall have passed both houses of the general court, shall, before it becomes a law, be presented to the governor. . . ." <sup>132</sup> According to the court, the Reorganization Act would have reversed the constitutional processes for the adoption of legislation by allowing the governor to propose legislative action rather than to approve or disapprove it by means of his veto power.

The court also found that the Reorganization Act violated another section of the New Hampshire Constitution which provides that "[t]he supreme legislative power, within this state, shall be vested in the senate and house of representatives, *each of which shall have a negative on the other.*" <sup>133</sup> The requirement of a concurrent resolution of disapproval allowed one chamber to effectively approve the reorganization plan despite the disapproval of the other chamber. The court noted that "each house has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other."<sup>134</sup>

The court did not find that the Act's provision for gubernatorial submission of reorganization plans was an unconstitutional delegation of legislative powers to the executive branch. Rather, it found that the method of legislative review—which required both chambers of the legislature to disapprove the plan—was a violation of the constitutional provision requiring separate action by each house and subsequent gubernatorial approval. The proponents of the disapproved form of reorganization argued that federal congressional acts contained similar, if not identical, provisions.<sup>135</sup> The court responded that the federal constitution contains no express requirement that each house of the congress shall have a negative on the

---

130. *Id.*

131. *Id.* at § 4.

132. N.H. CONST. Pt. II art. 44.

133. N.H. CONST. Pt. II art. 2 (emphasis supplied).

134. 96 N.H. at 522, 83 A.2d at 741-42.

135. *Id.* at 523, 83 A.2d at 742, citing 47 Stat. 1517 (1932), and 53 Stat. 561 (1939). See text accompanying notes 30 and 37 *supra*.

other. The court also noted that the constitutionality of federal provisions had not been considered by the United States Supreme Court.<sup>136</sup>

The dissent voted to uphold the constitutionality of the reorganization statute,<sup>137</sup> relying upon the following language as support for the proposition that the method of legislative review was permissible: "[t]he General Court declares that the public interest requires the carrying out of the purposes specified in this section and that such purposes *may be accomplished more speedily and effectively under this Act than by the enactment of specific pieces of legislation covering each agency affected.*"<sup>138</sup> The minority also noted that the grant of authority was not meant to be continuous, but permitted only a single reorganization.<sup>139</sup> Furthermore, it noted the fact that the entire plan could be disapproved was indicative of the legislature's authority and power over such reorganizations. Finally, the minority commented that the violated constitutional provision related only to the supreme legislative power of the General Court when used for the passage of statutes, rather than for the type of reorganization envisioned by the law.<sup>140</sup>

No other state or federal courts have followed the direction taken by the New Hampshire Supreme Court.<sup>141</sup> The court's decision was expressly premised on the constitutional provisions that each house have both a veto power over the actions of the other chamber, and take separate action on any legislation. Although the language of the New Hampshire constitution that ". . . each [house] shall have a negative on the other"<sup>142</sup> is unique, and, accordingly, could be the basis for distinguishing the decision in Illinois,<sup>143</sup> apprehension that the Reorganization Act vested too much legislative authority in the governor appears to be the compelling reason for the decision. In Illinois, the same apprehension—despite the existence of a different constitutional structure for the approval of legislation—could provide a court with the tools to invalidate or limit the

---

136. *Id.* at 523, 83 A.2d at 742.

137. *Id.*

138. 1949 N.H. Laws ch. 43, § 1 (emphasis added).

139. 96 N.H. at 527, 83 A.2d at 744.

140. In so arguing, the dissenters pointed up a characteristic of the standard method of reorganization. Because of the governor's close involvement with the management of state government, the prerogative to initiate reorganization—in this one circumstance—should be shifted from the legislative branch to the executive. *Id.* at 526, 83 A.2d at 742-45. *See also* Letter of Hon. Griffin B. Bell at note 55 *supra*.

141. *See Brown v. Heymann*, 62 N.J. 1, 297 A.2d 572 (1972) discussed at text accompanying notes 156 through 162 *infra*.

142. N.H. CONST. pt. II, art. 2.

143. *See* ILL. CONST. art. IV, §§ 8-9.

reorganization process here. While such drastic action may not occur, the tension attendant to this separation of powers question will always be at issue, whether it be in the legislative treatment of reorganization plans or in a judicial forum reviewing action taken under the authority of a reorganization grant.

### Georgia

In 1972, the Georgia legislature adopted the Executive Reorganization Act of 1972<sup>144</sup> which transferred and consolidated the functions of 300 agencies and boards into twenty-two principal departments. This reorganization plan was submitted to the Georgia legislature after a study, commissioned by then-Governor Jimmy Carter, of that state's executive branch.<sup>145</sup> The extensiveness of the 1972 executive reorganization is attributed in part to the "strong personal interest [of Governor Carter] in accomplishing reorganization."<sup>146</sup>

In a challenge to the 1972 Georgia reorganization statute, *Carter v. Burson*,<sup>147</sup> the State Treasurer sought injunctive and declaratory relief from the effect of a constitutional amendment abolishing his office. He also challenged portions of the Executive Reorganization Act of 1972 which had transferred the functions of the State Treasurer and the Treasury Department to the fiscal division of the Department of Administrative Services.<sup>148</sup>

---

144. 1971 Ga. Laws ch. 40-35, §§ 40-3501 *et seq.* (as amended 1972).

145. The Executive Reorganization Act of 1972 was enacted one year after the promulgation of a statutory requirement that the agencies within the executive branch be consolidated into a reasonable number of departments for the purpose of achieving maximum efficiency and effectiveness. 1971 Ga. Laws ch. 40-2 (as amended 1972). This 1972 reorganization authorization repealed a statutory authorization for executive reorganization subject to legislative veto as such authority was thought to be of questionable constitutionality. 1974-75 BOOK OF THE STATES, STATE ADMINISTRATIVE ORGANIZATION ACTIVITIES 1972-73 at 137.

146. *Id.* See text accompanying notes 11 through 14, 60 through 70, and note 59 *supra*.

147. 230 Ga. 511, 198 S.E.2d 151 (1973).

148. *Id.* The case involved three other challenges to the Act. One attack was premised upon a constitutional prohibition against the passage of any statute referring to more than one subject matter and containing matter different from that expressed in the caption or title thereof. See GA. CONST. art. 13, § 1, par. 1 (1945). Another challenge was based on the argument that the constitutional amendment approved by the legislature and ratified by the voters in November of 1972, violated the same Georgia constitutional provisions which additionally required that when more than one constitutional amendment is submitted to the voters at the same time, such amendments must be submitted so as to allow voters to vote on each one separately. *Id.* A third challenge was based on the premise that the terms of the amendments proposed by the legislature and ratified by the voters were not sufficiently specific or explicit as to their effect in eliminating the office of the Treasurer. 230 Ga. at 521, 198 S.E.2d at 157. None of these challenges were successful.

It is interesting to note that this supreme court decision, approving the voter ratification of the elimination of the office of state treasurer and allowing the transfer of the treasurer's functions—via the Executive Reorganization Act of 1972—was the second time the Georgia supreme court effectively permitted the executive reorganization scheme to proceed un-

The Georgia Supreme Court rejected all challenges, stating that "while the scope and the sweep of that Act are broad, it is difficult to see how the manifest purpose thereof . . . could be effectively accomplished except in one enactment."<sup>149</sup> The Act's purposes were to consolidate the agencies of the state into a reasonable number of departments in order to achieve maximum efficiency and effectiveness; to simplify the operation of the executive branch of government; and to provide for the orderly transfer of functions as required by the Reorganization Act. The court stated further that "to require that the various changes in state governmental organization sought to be accomplished by this Act be broken down into separate components and enacted as separate acts in a piece-meal fashion would risk disruption and frustration of the purposes of the Act. . . ."<sup>150</sup> The court concluded that all of the parts of the Executive Reorganization Act, affecting 300 agencies, were "germane to a single purpose."<sup>151</sup> Thus, the Georgia Supreme Court allowed a comprehensive reorganization to be carried out, despite the challenge of an elected official whose office had been reorganized out of existence.

### New Jersey

#### The New Jersey Executive Reorganization Act of 1969<sup>152</sup> permits

---

impeded by judicial challenge. Burson's lawsuit was filed in September, 1972, and a superior court judge in Georgia issued a restraining order preventing the advertising of the constitutional amendment to eliminate the office of treasurer. 230 Ga. at 515, 198 S.E.2d at 154. This same trial court had rejected an attempt by the Attorney General to allow the advertising to proceed, only to be overruled by the supreme court which determined in October of 1972—one month prior to the general election at which the constitutional amendment was to be considered—that the advertising of the election should proceed. *Carter v. Burson*, 229 Ga. 748, 194 S.E.2d 472 (1972). After the general election, in which the voters ratified the abolition of the office of treasurer, plaintiff Burson convinced the trial court that the terms of the constitutional amendment did not manifest an intention to abolish the office of state treasurer. That court did not pass on the other questions raised respecting the validity of the submission of the constitutional amendments to the voters nor respecting the constitutionality of the Executive Reorganization Acts. From this decision, Governor Carter appealed. Plaintiff challenged the constitutional amendment on the ground that such amendment violated the constitutional provision that "when more than one amendment is submitted at the same time they shall be so submitted so as to enable the electors to vote on each amendment separately." (GA. CONST. art. 13, § 1). In this regard, plaintiff stated that since the senate resolution ordering a voter referendum dealt with the manner of election and qualifications of the state treasurer as well as the manner of protecting the sinking fund of the state and the method of handling and disbursing grants to counties, all four of those issues should have been separately submitted to the voters. The supreme court felt that there was no merit in this contention, stating that the four issues regarding the state treasurer's office were germane to each other, and that all dealt fundamentally with whether or not the constitution of the state should be amended so as to delete the name and office of the state treasurer therefrom. 230 Ga. at 520, 198 S.E.2d at 157.

149. *Id.* at 520, 198 S.E.2d at 156-57.

150. *Id.*

151. *Id.*

152. N.J. STAT. ANN. §§ 52:14C-1 *et seq.* (West 1970).

the governor to submit to the Senate and General Assembly a reorganization plan providing for the consolidation, merger, coordination or abolition of agencies or functions. Upon the passage of sixty calendar days following the transmission of a plan, it becomes law unless both houses of the legislature combine to pass a resolution stating that the legislature does not favor the reorganization plan.<sup>153</sup> The New Jersey law, like California's,<sup>154</sup> includes a provision affirmatively providing that the Act should not deprive any person of his or her rights under the civil service statute, pension law, or retirement system of the State of New Jersey.<sup>155</sup>

In *Brown v. Heymann*,<sup>156</sup> the New Jersey Supreme Court considered a challenge to the Reorganization Act on the grounds that the method of adopting a plan violated the state constitutional mandate that a bill must be agreed to by a majority of all the members present in each house and then be presented to the governor for his consideration. The Act was also attacked on the grounds that the governor would be exercising legislative power in violation of the constitutional requirement that "the powers of the government shall be divided among three distinct branches . . . [and] [n]o person . . . belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others. . . ."<sup>157</sup> The plaintiffs, challenging a plan to reorganize the Department of Labor and Industry, also contended that the power to reorganize is non-delegable.<sup>158</sup>

In a unanimous decision, the New Jersey Supreme Court upheld all aspects of the Act.<sup>159</sup> With regard to the allegation that the governor would be exercising legislative power, the court noted that the

---

153. *Id.* at § 52:14C-7(a).

154. See text accompanying notes 164 through 177 *infra*.

155. N.J. STAT. ANN. § 52:14C-8 (West 1970).

156. 62 N.J. 1, 297 A.2d 572 (1972).

157. N.J. CONST. art. III, § 1.

158. 62 N.J. at 6, 297 A.2d at 575.

159. *Id.* at 11, 297 A.2d at 578. In considering the Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950), discussed at text accompanying notes 128 through 143 *supra*, the New Jersey Supreme Court concluded that the decision did not support the proposition that the power to adopt effective reorganization plans may not be delegated to the governor. Rather, the fatal defect in the New Hampshire scheme, according to the New Jersey court, was the absence of such a delegation and the subsequent reversal of the constitutional process for legislating. 62 N.J. at 8, 297 A.2d at 576. The New Jersey court agreed with the dissenting New Hampshire justices who found that there was such a delegation. The New Jersey court also noted that the constitutionality of the federal executive Reorganization Act, 5 U.S.C. §§ 901 *et seq.* (1970 & Supp. IV (1974) & U.S.C.A. (1977), had been upheld in *Isbrandtsen-Moller Co. Inc. v. United States* and *Swayne & Hoyt v. United States* mentioned at note 52 *supra*. The New Jersey reorganization act was expressly patterned on the federal statute. 62 N.J. at 6, 297 A.2d at 575.

plaintiffs did not allege that the delegation to the governor was without adequate standards.<sup>160</sup> Acknowledging that there had been a delegation of legislative authority, the court confronted the separation of powers issue:

[W]e think it enough to ask whether the statute so enhances the executive power as to threaten the security against aggregated power which the separation-of-powers doctrine was designed to provide. We must assume the Legislature found there is no such threat, and we must accept that evaluation unless it is plainly wrong. We cannot say it is. We note that the Governor is limited to rearranging what already exists. He is not empowered to decide what new or different authority should be vested in his branch of government. . . . [T]he statute confines the delegated authority by providing that a reorganization plan may not create a new principal department in the executive branch or abolish a principal department or consolidate two or more of them; or extend the life of an agency; or authorize an agency to exercise a function not then expressly authorized by law; or increase the term of an office. N.J.S.A. 52:14C-6(a). We need not say a reorganization statute could not go further. We note the limitations in the statute to explain our finding that the statute as it stands is not vulnerable.<sup>161</sup>

The New Jersey Supreme Court's reasoning on the separation of powers issue is sound, and the opinion addresses an issue which should be considered by the Illinois General Assembly. There are no existing statutory safeguards or "adequate standards" which define

---

160. *Id.* at 5-6, 297 A.2d at 575. The standards which the court determined to be adequate in this case are found in part in the "purpose clause" of the Reorganization Act of 1969 which reads:

(a) The Governor shall from time to time examine the organization of all agencies and shall determine what changes therein are necessary to accomplish the following purposes:

- (1) To promote the better execution of the laws, the more effective management of the Executive branch and of its agencies and functions, and the expeditious administration of the public business;
- (2) To reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Executive;
- (3) To increase the efficiency of the operations of the Executive to the fullest extent practicable;
- (4) To group, coordinate, and consolidate agencies and functions of the Executive, as nearly as may be, according to major purposes;
- (5) To reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Executive; and
- (6) To eliminate overlapping and duplication of effort.

N.J. STAT. ANN. § 52:14C-2 (West 1970). The court also noted with approval that the New Jersey law stated what a reorganization plan could accomplish, *id.* at § 52:14C-4 (West 1970). Compare CAL. GOV'T CODE § 12080 (West Supp. 1977).

161. 62 N.J. at 10, 297 A.2d at 577.

the boundaries or goals of executive reorganization in Illinois.<sup>162</sup> Whether such statutory limitations are constitutionally acceptable vis-à-vis article V, section eleven of the Illinois Constitution will be determined by the courts. The possibility of establishing such standards and limitations exists, and, given the broad terms of the constitutional provision, the imposition of such legislation is invited.

### California

In 1967, the California legislature adopted a comprehensive statutory scheme mandating gubernatorial examination of the organization of the executive branch<sup>163</sup> "from time to time." The statute requires that when the governor finds reorganization would be in the public interest, he or she is required to prepare one or more reorganization plans and to forward them in the form of a legislative bill or bills to the legislature during its regular session. Upon the receipt of the bill, each house of the California legislature must refer it to a standing committee for study and then produce a report on the plan. The reorganization plan shall become effective sixty days after its transmittal to each chamber unless prior to the end of this time period an absolute majority of either house adopts a resolution of disfavor.<sup>164</sup> Although this statutory scheme does not include reorganization by executive order, the effect of an executive's submission of a bill which becomes effective unless affirmatively vetoed by either house is the same as in those states which allow reorganization by executive order.<sup>165</sup>

The scope of reorganization under the California statute is extensive and may include the following: abolition of any existing agency's functions; the transfer of any part or all of an agency's functions to another executive department; the consolidation and coordination of the functions or some part of any executive agency; the abolition in whole or in part of any agency which, upon the taking effect of a reorganization plan, has no functions remaining; and the establishment of new agencies to perform the functions of any existing agency or departments.<sup>166</sup> Furthermore, the California legislature has declared that the public interest requires the reorganization accomplish one or more purposes,<sup>167</sup> including: the better execution of laws and the more efficient management of the

---

162. See discussion at text accompanying notes 296 through 316 *infra*.

163. CAL. GOV'T CODE §§ 12080 *et seq.* (West Supp. 1977).

164. *Id.* at § 12080.5.

165. See text accompanying notes 75 through 123 *supra*.

166. *Id.* at § 12080.

167. *Id.* at § 12080.1.

executive and administrative branches of government; the reduction of expenditures and the promotion of state government economies; the increased efficiency of state government; the consolidation of agencies and agency functions according to major purposes; the reduction of the number of agencies; and the elimination of overlapping and duplicated effort.<sup>168</sup>

A California executive reorganization plan may not pertain to a number of areas,<sup>169</sup> such as the continuation of any agency or any agency function beyond the time period authorized by law for its exercise.<sup>170</sup> Furthermore, a plan may not authorize an agency to exercise any function not expressly permitted by law—in other words, while agencies may be created by an executive reorganization plan, functions of government agencies may not be so created. No reorganization plan can provide for the abolition of an agency created by the California Constitution.<sup>171</sup>

The California Attorney General has declared that during both the sixty day period following the submission of a reorganization plan to the legislature,<sup>172</sup> and also after the expiration of that time period,<sup>173</sup> the governor may neither withdraw nor amend any part of that plan. This ruling however, does not restrict the legislature from adopting changes to any reorganization plan in the form of new legislation.<sup>174</sup> Additionally, all reorganization plans must contain some provision for the transfer of employees covered by the state's civil service code to the agency which assumes the transferred function. Finally, the same section provides that the "status, positions, and rights of . . . persons [covered by the California Civil Service Act] shall not be affected by their transfer. . . ."<sup>175</sup> Such a provi-

168. *Id.*

169. *Id.* at § 12080.4.

170. See note 326 and accompanying text *infra*, discussing "sunset" legislation.

171. Like many other jurisdictions which have detailed statutory reorganization provisions, California law provides for the continued effectiveness of rules, regulations, administrative orders and the like, adopted or otherwise promulgated by a department or agency affected by a subsequent reorganization plan. The California provision states:

No reorganization plan shall have the effect of limiting in any way the validity of any statute enacted, or any regulation or other action made, prescribed, issued, granted or performed in respect to or by any agency before the effective date of the reorganization plan except to the extent that the plan specifically so provides.

As used in this section "regulation or other action" means any regulation, rule, order, policy, determination, directive, authorization, permit, privilege, requirement, designation, or other action.

CAL. GOV'T CODE § 12080.6 (West Supp. 1977). See also, e.g., PA. STAT. ANN. tit. 71, § 750-8 (Purdon 1962); N.J. STAT. ANN. § 52:14C-10 (West 1970).

172. OP. ATT'Y GEN., California, *Assembly Daily Journal* 23254 (April 22, 1969).

173. OP. ATT'Y GEN., California, *Assembly Daily Journal* 1007 (March 17, 1969).

174. OP. ATT'Y GEN., California, *Assembly Daily Journal* 2324 (April 22, 1969).

175. CAL. GOV'T CODE § 12080.3(c) (West Supp. 1977).

sion obviates to a significant extent any challenge by employees transferred among state agencies as a result of reorganization. But it also negates the possibility of economizing by eliminating personnel in state government through the reorganization plan.

According to the debates of the Sixth Illinois Constitutional Convention, an executive order effectuating reorganization may not be amended by the General Assembly after it is submitted.<sup>176</sup> It is unclear whether an executive order could be *withdrawn* after its submission. Nor is there any statutory provision which insulates employees affected by reorganization, though one of the comprehensive executive orders effectuating reorganization thus far implemented in Illinois provided protection for workers' rights under the personnel code.<sup>177</sup>

#### THE ILLINOIS EXPERIENCE WITH EXECUTIVE REORGANIZATION PRIOR TO 1970

In 1917 the Illinois General Assembly, at the urging of a new governor, passed a statute reorganizing state government. While not a reorganization proposed by executive order subject to legislative veto (the focus of this article), it did represent the first comprehensive state reorganization initiated in the United States. The history of the attempts to reorganize Illinois state government since that time is relevant to the development of article V, section 11 of the 1970 Constitution. That reorganization was embodied in a statutory scheme known then—as it is now—as the Civil Administrative Code.<sup>178</sup> Due principally to the efforts of Governor Frank O. Lowden and his administration, it represented, both from a political and an administrative perspective, one of his most significant contributions to Illinois state government.<sup>179</sup> Today, sixty years later, a successor of Lowden is emphasizing that one of his most significant initiatives will be the reorganization of the system which in the early 1900's held promise, but which is now described as cumbersome and, in some cases, unworkable.<sup>180</sup>

---

176. See text accompanying note 233 *infra*.

177. See text accompanying note 259 *infra*.

178. Civil Administrative Code 1917 Ill. Laws 2 (current version at ILL. REV. STAT. ch. 127, §§ 1-63b15 (1975)).

179. W. HUTCHINSON, *LOWDEN OF ILLINOIS: THE LIFE OF FRANK LOWDEN* 295 (Chicago, 1957) [hereinafter cited as HUTCHINSON]. See also D. KENNEY, *BASIC ILLINOIS GOVERNMENT* 215-70 (1974).

180. "ORDERLY GOVERNMENT" ORGANIZING FOR MANAGEABILITY, REPORT OF THE ILLINOIS TASK FORCE ON GOVERNMENTAL REORGANIZATION, Donald R. Bonniwell, Sr., Chairman (Chicago, 1976) [hereinafter cited as Bonniwell Report].

*The Civil Administrative Code of 1917*

The foundation and mandate for Illinois executive reorganization were provided by the administration of Governor Edward F. Dunne in 1915. At the suggestion of Governor Dunne, the Illinois legislature established the Efficiency and Economy Committee, comprised of four Senators and four Representatives, to prepare recommendations for the reform of the executive and administrative structure of Illinois government.<sup>181</sup> After two years of study, a series of public hearings, and a review of the administrative structures in several states besides Illinois, the Committee's recommendations were set forth in a comprehensive report.<sup>182</sup>

The most significant recommendation by the Committee provided that most of the hundred or more boards, commissions, and bureaus of state government should be organized into ten principal departments<sup>183</sup> headed by directors immediately responsible to the governor.<sup>184</sup>

Unlike the actual provisions of the Civil Administrative Code resulting from Governor Lowden's efforts, the Dunne recommendations lacked emphasis on fiscal management and centralization of financial control of state government departments.<sup>185</sup> The Dunne committee dealt only with appointed offices and made no mention of the functions assigned to constitutionally elected state officials such as the Secretary of State and Attorney General.

Before his inauguration, Lowden had reviewed the Committee's recommendations and concurred generally with most of them.<sup>186</sup> His administration, working closely with prominent members of the legislature, determined that administrative reorganization would be their principal goal during the first year of the gubernatorial term. The party platforms in the 1916 gubernatorial race emphasized the desirability of a comprehensive executive reorganization plan.<sup>187</sup>

Early in 1917, the first year of the Lowden administration, an omnibus reorganization bill was prepared and presented to the legislature.<sup>188</sup> Only three weeks later, the bill, in a substantially unal-

---

181. 1915 Ill. Laws 733.

182. REPORT OF THE EFFICIENCY AND ECONOMY COMMITTEE (created under the authority of the 48th Illinois General Assembly) (1915).

183. HUTCHINSON, *supra* note 179, at 296.

184. *Id.*

185. *Id.* at 300.

186. *Id.* at 296.

187. *Id.* at 301.

188. *Id.* House Bill No. 279, 50th Illinois General Assembly (1917). The use of the comprehensive single piece of legislation, rather than a series of individual legislative proposals affecting the executive branch, was a decision consciously made for strategic reasons by the

tered form, was passed by the legislature and presented to the Governor for his signature.<sup>189</sup> This prompt legislative response was unique to Illinois government, and attested to the favorable political disposition towards reorganization at that time. The Act consolidated 125 boards, bureaus and commissions into nine code departments, each with a director responsible to and appointed by the governor.

Despite predictions to the contrary, Lowden's Civil Administration Code survived the next session of the legislature and, in fact, served as the foundation for the executive branch of Illinois government to the present time. Lowden's use of the Department of Finance as his budget-making division was probably the most important single administrative outgrowth of the reorganization itself. Nonetheless, what was in 1917 the first—and indeed a most comprehensive and efficient—reform of the executive branch in state government in the United States became, thirty years later, a system which another study and advisory committee found “militates against . . . effective and responsible government.”<sup>190</sup> Between 1917 and 1949, there was no comprehensive legislative reorganization of Illinois government, nor the suggestion of the same by any advisory committee.

*The Commission to Study State Government, 1950*

In 1949, the Sixty-sixth Illinois General Assembly directed the creation of the Commission to Study State Government.<sup>191</sup> The legislation creating the Commission directed its members to study the organization and operations of the executive branch with a view towards greater efficiency and economy. Matters relating to the structure of local government and changes in the state's revenue system were explicitly excluded from the scope of the Commission's inquiry.<sup>192</sup> While nine code departments and twelve agencies existed

---

Lowden administration. They felt that coming in early in the session with a comprehensive single bill would force the legislature to focus on the issue. Following the lead of the Efficiency and Economy Committee, none of Lowden's suggestions affected the operation or the function of other constitutional executive officers. The most reformatory aspect of the legislative proposal was the establishment of a Department of Finance for the purpose of initiating, according to Hutchinson's biography of Lowden, “a uniform bookkeeping system in all state offices and [to] gather from them the information needed for compiling a centralized and scientific budget.” HUTCHINSON, *supra* note 179, at 300.

189. 1917 Ill. Laws 2.

190. COMMISSION TO STUDY STATE GOVERNMENT, REPORT TO THE GENERAL ASSEMBLY, Walter V. Schaefer, Chairman, ORGANIZATION AND FUNCTIONING OF THE STATE GOVERNMENT (1950) [hereinafter cited as Schaefer Report].

191. 1949 Ill. Laws 79.

192. Also excluded from the study was the higher education system in Illinois as that was

at the time of the 1917 adoption of the Civil Administrative Code, in 1950 thirteen code departments and some fifty-nine miscellaneous agencies, offices and boards were in existence.<sup>193</sup>

The report of the committee (the Schaefer Report), was submitted to the General Assembly in 1950. It made recommendations for legislative enactments in areas including welfare services, health services, natural resources, highways, personnel agencies, revenue collecting agencies, and other administrative and executive functions.<sup>194</sup> It also recommended the elimination of specific boards, agencies, and other executive functions to increase efficiency and economy within the state government.<sup>195</sup>

---

then the subject of a special study by the United States Office of Education. Additionally, pension fund administration and state administrative procedures were also excepted from the scope of this study as both were the subject of other commission studies. The report was confined to the executive branch of government and, recognizing the political thicket surrounding the number of elected state constitutional officials, did not address the short ballot issue. Additionally, the report states that it made no recommendations with respect to the issue of "the distribution of major functions between the elective officers and other state departments and agencies." Schaefer Report, *supra* note 190, at 1. This is, in a sense, the essence of the executive reorganization issue. It should be noted, however, that the Commission did recommend, in a number of areas, the abolition of various commissions and bureaus and the consolidation and coordination of various agencies and agency functions. Thus, although it professes an avoidance of the politically thorny issue of which department controls what sub-groups and functional responsibilities, by recommending legislation, the Commission addressed the question of expanding and spiraling governmental organization. See generally Schaefer Report, *supra* note 190.

193. Schaefer Report, *supra* note 190, at 5. The Commission reports, with respect to this burgeoning bureaucracy, that

the very existence of the present fifty-nine miscellaneous agencies, thirteen code departments, and seven elective officials within the executive branch of our state governments militates against the effective and responsible government to which the people of Illinois are entitled. Fiscal and operational control is made unnecessarily complex. Without an occasional overhaul, the future can be expected to increase these difficulties.

*Id.* at 6.

194. See generally Schaefer Report, *supra* note 190, at 6-64.

195. See, e.g., Schaefer Report, *supra* note 190, at 10, where the Commission recommends that the functions of the Illinois Public Aid Commission, the Division of Services for Crippled Children, the Division of Vocational Rehabilitation, the Commission for Handicapped Children and the Board of Education for the Blind and Deaf be united in the Department of Public Welfare. The Commission also recommended that administration of the state's program relating to natural resources be integrated in a Department of Natural Resources and Conservation, with the Division of Waterways, the Division of Parks and Memorials, and the Natural History, Water and Geological Surveys. Schaefer Report, *supra* note 190, at 13-14. The surveys were later placed in the Department of Registration and Education. Twenty-six years after the presentation of the Schaefer Report, the Bonniwell Report recommended the development of a Department of Natural Resources, Conservation and Management with the Surveys and the Division of Water Resources of the Department of Transportation as a part of the new Department. Bonniwell Report, *supra* note 180, at 153-57. Beyond these recommendations regarding the more efficient organization of state government, the Schaefer Report includes specific suggestions regarding the administration of state government including

The Commission apparently did not consider the federal procedure of reorganization by executive order subject to legislative veto. Rather, executive reorganization was viewed from the perspective of effecting a comprehensive legislative scheme treating the existing code departments and miscellaneous agencies on an organizational basis.<sup>196</sup> The Commission envisioned reorganization as a joint venture between the executive and legislative branches, with the initiative for such reorganization being vested in the legislature.

*Report of the Commission on State Government—Illinois,  
January, 1967*

In 1965, the Seventy-fourth Illinois General Assembly created a Commission on State Government (COSGI) to study and suggest changes in the structure of state government.<sup>197</sup> The study was to focus on the executive branch, excluding any study of local governmental structure and financing.<sup>198</sup> In January of 1967, the Commission reported to the General Assembly and Governor Kerner with 287 specific recommendations for administrative, statutory, or constitutional action. All recommendations were directed towards the following goals: "(1) simplification and coordination of the organizational structure, (2) elimination of overlapping, duplicating of unnecessary powers and duplications of duties, (3) improved administrative practices and procedures, and (4) increased efficiency and economy in State Government."<sup>199</sup>

Unlike its predecessors, this Commission did specifically recommend reorganization by means of executive order.<sup>200</sup> This recommendation was premised on the Commission's finding that legislative reorganization frequently took a back seat to legislative policy considerations. Thus, the Commission felt that to effectuate "continuous improvement in administrative organization and functioning," the "greater stimulation of the executive branch to submit actionable [reorganization] proposals to the legislative branch" was the most effective method of executive reorganization.<sup>201</sup> Essen-

---

its personnel policies, its auditing and fiscal control, its collection of revenue, its executive budgetary process, the purchasing and printing of government documents and other related administrative areas. See Schaefer Report, *supra* note 190, at 69-98.

196. This is the same conclusion reached by the 1915 Efficiency and Economy Commission. See HUTCHINSON, *supra* note 179, at 293-94.

197. 1965 Ill. Laws 3055.

198. *Id.* The Commission was comprised of 15 members including five state senators, five state representatives, and five public members appointed by the governor.

199. *Id.* at § 2(c).

200. RECOMMENDATION §19, REPORT OF THE COMMISSION ON STATE GOVERNMENT—ILLINOIS—TO THE GENERAL ASSEMBLY AND THE GOVERNOR (1967).

201. *Id.*

tially the Commission felt that the likelihood of achieving executive reorganization was enhanced by permitting executive initiative subject to legislative veto as the standard manner of effectuating reorganization.

To that end, the Commission recommended that a statutory provision authorizing reorganization by executive order be adopted:

The Governor should be authorized to promulgate plans for the reorganization of administrative agencies and the reassignment of functions by executive order. Such plans should be filed with the General Assembly no later than April 1 of a regular session year and become effective on a date specified by the Governor, unless disapproved by resolution of either house within 60 calendar days after submission. The statute should contain appropriate criteria for reorganization and limitations on the scope of action that may be taken by executive order. Existing statutory specifications of organizational arrangements should be made subject to this reallocation of authority and responsibility.<sup>202</sup>

In the General Assembly session following the submission of the report, Senator Terrell Clarke, a member of the Commission, introduced legislation providing for reorganization by executive order subject to legislative veto.<sup>203</sup> This legislation did not become law.<sup>204</sup> In the next General Assembly, held immediately prior to the start of the Sixth Illinois Constitutional Convention, a concerted legisla-

---

202. *Id.* Three members of the Commission dissented from this recommendation, including Illinois' current Secretary of State Alan J. Dixon, then an Illinois State Senator.

203. Senate Bill No. 1743, 75th Illinois General Assembly (1967). The bill was comparable to the then-existing Pennsylvania statute and to the soon to be adopted California and New Jersey laws. See note 124, and text accompanying notes 163 through 171, 152 through 155 *supra*. The bill provided:

Section 5. The Governor shall transmit a reorganization plan to the General Assembly not later than April 1 of a regular session year, together with a message containing his reasons for the proposed reorganization and enumerating specifically all statutory changes required to effect the plan.

The reorganization plan shall take effect on a date specified by the Governor at least 60 days from the date on which the plan is transmitted to the General Assembly, but only if neither house of the General Assembly by resolution disapproves of the reorganization plan within 60 days of its submission to that house. A provision of a reorganization plan, if contained in the plan as submitted to the General Assembly, may take effect at a date later than that on which the plan shall otherwise become effective.

If either house of the General Assembly disapproves of a reorganization plan in whole or in part within 60 days from the date of transmittal by the Governor the plan shall not take effect, but the Governor may transmit a new or amended plan which shall take effect on a date specified by the Governor not less than 60 days from the date on which the plan is transmitted to the General Assembly, but only if neither house of the General Assembly disapproves of the plan by resolution within 60 days of its transmittal.

204. FINAL LEGISLATIVE SYNOPSIS AND DIGEST, 75th Illinois General Assembly 568 (1967).

tive effort was launched to consolidate and eliminate various state commissions and boards.<sup>205</sup> Several bills were introduced which would have abolished thirty-nine advisory boards and commissions in the executive and legislative branches.<sup>206</sup> Like the Clarke effort of the previous year, none of these bills were approved by the legislature.<sup>207</sup>

### *The Sixth Illinois Constitutional Convention and Executive Reorganization*

The delegates to the Sixth Illinois Constitutional Convention were able to forge a constitutional provision for reorganization of state government by executive order, even though legislative attempts to achieve this purpose had been unsuccessful.<sup>208</sup> In fact, a review of the actions of the Con-Con's Executive Article Committee [EAC], and the delegates' floor treatment of the executive reorganization proposal, indicates that the proposal did not encounter significant opposition at Con-Con.<sup>209</sup>

### *Executive Article Committee's Consideration of Executive Reorganization*

The 1870 Illinois Constitution made no provision for executive reorganization by the governor.<sup>210</sup> At the start of the EAC's work at the 1970 Con-Con, issues relating to the short ballot-long ballot debate, the timing of state-wide election of constitutional officers vis-à-vis the timing of presidential elections, and the question of fragmented responsibilities in the state's fiscal management were the most pressing questions confronting the eleven member committee.<sup>211</sup> The EAC first focused on the concept of agency reorganization

205. In January, 1970, the Illinois Legislative Council issued a report entitled *Boards, Commissions in State Government*, which stated:

A survey of various source materials indicates that there are more than 200 state boards, commissions, and committees in Illinois. . . . This estimate does not include various State-local and interstate agencies which are not considered here. . . . Students of public administration are generally agreed . . . that boards and commissions are desirable for quasi-judicial and quasi-legislative functions and undesirable for purely administrative functions.

*Id.* at 1, 3.

206. House Bills 1531 through 1564, 76th Illinois General Assembly (1969).

207. FINAL LEGISLATIVE SYNOPSIS AND DIGEST, 76th Illinois General Assembly 1025-32 (1969).

208. See text accompanying notes 203 and 204 *supra*.

209. See text accompanying notes 221 through 242 *infra*.

210. ILL. CONST. art. V (1870). See G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 253-325 (1969).

211. See D. NETSCH, THE EXECUTIVE IN CON-CON ISSUES FOR ILLINOIS CONSTITUTIONAL

when it considered the various member proposals relevant to the executive article<sup>212</sup> The most significant of these was Delegate Dawn Clark Netsch's Member Proposal No. 300.<sup>213</sup> This proposal for

---

CONVENTION 144 (V. Ranney ed. 1970); REPORT OF THE CONSTITUTION STUDY COMMISSION 16-17 (1967).

The earliest indication of the Executive Article Committee staff's view of executive reorganization indicates a rejection of the limitation on the number of principal executive departments responsible to the governor. In an initial briefing for Committee members, Dr. Jack F. Isakoff, staff counsel to the Executive Article Committee (EAC), indicated that any such numerical limitation "should presumably be rejected." Sixth Illinois Constitutional Convention Executive Article Committee file notes, Illinois State Historical Library, Springfield, Illinois. This early judgment, while attentive to the political disfavor which would accompany such a limitation in Illinois, was clearly not dispositive of the general agency reorganization issue. The files of the Executive Article Committee indicate that some attention was paid to the issue by various individuals and groups testifying before the Committee in January and February, 1970. Elbert Smith, former Auditor of Public Accounts and delegate to the convention, appeared before the EAC and cited Governor Lowden's emphasis on the need to end the fragmented and cumbersome Illinois executive branch. EXECUTIVE ARTICLE COMMITTEE MINUTES, January 21, 1970, Illinois State Historical Library, Springfield, Illinois. The Chicago Bar Association's Executive Article Committee on Constitutional Revision, like Dr. Isakoff, rejected the model state constitution provision limiting the number of principal code departments. REPORT ON EXECUTIVE ARTICLE COMMITTEE ON CONSTITUTIONAL REVISION, Chicago Bar Association, 1970. This CBA Committee report noted that such a limitation was "arbitrary and possibly harmful" and that the governor already had an "inherent power of reorganization." *Id.* The League of Women Voters of Illinois, while opposing "a listing or limitation on the number of departments in the executive branch," supported a constitutional provision for reorganization by the governor "with major changes being accomplished in cooperation with the legislature." Statement on the Executive to the Executive Committee of the Illinois Constitutional Convention, February 24, 1970, by Mary Helen B. Robertson, President, League of Women Voters of Illinois 2.

212. EXECUTIVE ARTICLE COMMITTEE MINUTES, February 27, 1970, Illinois State Historical Library, Springfield, Illinois.

213. RECORD OF PROCEEDINGS, Sixth Illinois Constitutional Convention, vol. VII at 2975 [hereinafter cited as RECORD OF PROCEEDINGS]. Member Proposal No. 300 provided as follows:  
BE IT PROPOSED:

That the Constitution include a provision substantially as follows:

The Governor may make such changes in the allocation of offices, agencies and instrumentalities in the executive branch of the State government, and in the allocation of their functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the legislature while it is in session, and shall become effective, and shall have the force of law, 60 days after submission, or at the close of the session, whichever is sooner, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members of each house.

Ten other convention delegates joined in the Netsch proposal.

While the files of the Executive Article Committee do not reflect the Committee's initial views on the Netsch proposal, staff comments with regard to the suggestion were generally favorable. In a tentative recommendation, the Executive Article Committee staff noted that the 1967 COSGI report had recommended the approach embodied in member proposal No. 300, and additionally cited the Alaska, Massachusetts, Michigan and federal precedents consistent with the proposal. In outlining arguments in favor of and opposed to the proposal, the staff notes that if the governor is not given such power to reorganize, utilization of the legislative process for reorganization "will be unnecessarily difficult to accomplish." The

agency reorganization by executive order was incorporated in the Committee's preliminary draft of the executive article considered in May, 1970.<sup>214</sup>

More importantly, when the EAC reported officially to the Con-Con, its Proposal No. 1 included a provision for agency reorganization by executive order subject to legislative veto.<sup>215</sup> The "Explanation and Commentary" section on the agency reorganization proposal provides significant background on the EAC's view of the justification for and application of the section.<sup>216</sup>

The Committee noted that misassignment of functions, overlapping and diffused responsibilities, fragmentation of functions, as well as the proliferation of separate agencies were the governmental ills to be remedied by its proposed agency reorganization scheme.<sup>217</sup> According to the EAC, the greatest hurdle to effective reorganization was "inertia," indicating that administrative changes by the legislature were traditionally relegated to a low priority in the larger

---

countervailing argument raised by the staff was that to vest such reorganization power in the governor would enroach on the power of the legislature and give too much power to the governor. See GOVERNOR'S REORGANIZATION POWER, EXECUTIVE ARTICLE COMMITTEE STAFF ANALYSIS, Member Proposal 300, Illinois State Historical Library, Springfield, Illinois.

Two other Member Proposals also pertained to executive reorganization. Delegate Fogal's Member Proposal No. 36 suggested that the Constitution provide that there exist no more than 20 principal departments in Illinois' executive branch. RECORD OF PROCEEDINGS, *supra* note 213, vol. VII at 2860. Member Proposal No. 120 (Delegates Gertz and Ronald C. Smith) suggested a constitutional provision authorizing the General Assembly to combine offices and officials of the executive department. *Id.* at 2897.

214. Sixth Illinois Constitutional Convention, Committee on the Executive Proposal No. 1 at 11 (Preliminary Draft of May 5, 1970), Illinois State Historical Library, Springfield, Illinois. There is some indication that the Committee staff considered this provision too significant an encroachment on the legislature's prerogative to reorganize to allow for its inclusion in the executive article report to the floor of the Con-Con. Staff papers prepared for Executive Article Committee, Paper No. 15, "Constitution Innovations" at 8, Illinois State Historical Library, Springfield, Illinois. There is no evidence or record of the Committee's consideration of this draft proposal in the EAC's files at the Illinois State Historical Library.

215. Committee on the Executive Proposal No. 1, in RECORD OF PROCEEDINGS, *supra* note 213, vol. VI at 335, 387. In transmitting this proposal to the Con-Con, the chairman and vice-chairman of the committee noted that the reorganization provision was a "particularly significant" part of the entire proposal. *Id.* at 337-38. The provision stated as follows:

*Agency Reorganization.* The governor may, by executive order, reassign functions among or reorganize executive agencies which are directly responsible to him. Where statutory law would be modified, the order shall be sent to the General Assembly by April 1 of the year of its next regular session. Such an executive order shall become effective 60 calendar days after its receipt by the General Assembly unless earlier disapproved by a majority of all the members of either house, by yeas and nays entered upon its journal, or unless a later date is specified in the executive order.

*Id.* at 387-88.

216. *Id.* at 388-90.

217. *Id.* at 388-89.

scheme of legislative policy-making, if they were even proposed at all.<sup>222</sup> The proposal also noted that in some cases political opposition impeded even the *introduction* of legislation effectuating reorganization of the executive branch. In other words, the EAC felt that the initiative for reorganization should reside with the governor, subject to appropriate legislative restrictions.<sup>219</sup>

The final portion of the Committee's commentary section, which might serve as the foundation for future legislative or judicial challenges to reorganization proposals made by the governor, states that "the changes which could take place under the new authorization relate to organizational forms and placement *and not to substantive policy.*"<sup>220</sup>

#### The Convention's Consideration of Executive Reorganization

The EAC's Chairman, Joseph Tecson, presented the executive reorganization committee proposal to the delegates of the Con-Con on first reading.<sup>221</sup> In that presentation, Tecson characterized the reorganization provision as a "housekeeping function."<sup>222</sup> Possibly in an attempt to ameliorate the threat of impinging upon the legislature's prerogative with respect to reorganization, Tecson noted that the proposal dealt only with agencies directly responsible to the governor and "in no way . . . impinges upon the authority of other elected officers."<sup>223</sup> He further indicated that the proposal "in no way touches upon . . . quasi-judicial or quasi-legislative boards,"<sup>224</sup> such as the Illinois Commerce Commission and the Illinois Industrial Commission, and that the proposal was not intended to "create any authority or to remove any authority."<sup>225</sup> Tecson stated

---

218. *Id.*

219. *Id.* The commentary section of this Committee proposal also emphasizes the General Assembly's authority to reject reorganization suggestions with which they disagree. *Id.* at 387.

The report further cites the success of the federal government's provision permitting executive reorganization, noting that such provision has allowed for reorganization "virtually continuously for the past forty years." *Id.* at 389-90.

220. *Id.* at 390 (emphasis added). A staff analysis prepared for the First Reading floor debate on Executive Article Committee Proposal No. 1 indicates that a major alternative not included in the agency reorganization proposal was that of "[e]xtending the executive reorganization power to all the agencies in the Executive branch." ANALYSIS OF CHANGES INVOLVED IN EXECUTIVE COMMITTEE PROPOSAL NO. 1, Committee Memorandum 21 at 9 (May 20, 1970), Illinois State Historical Library, Springfield, Illinois. See also comment of EAC Chairman Joseph Tecson at RECORD OF PROCEEDINGS, *supra* note 213, vol. III at 1327, that the Commerce Commission and Industrial Commission were not intended to be affected by the constitutional agency reorganization section. See also text accompanying notes 276 through 278 *infra*.

221. RECORD OF PROCEEDINGS, *supra* note 213, vol. III at 1222, 1327-31.

222. *Id.* at 1327.

223. *Id.*

224. *Id.*

225. *Id.*

that the Committee's view of the grant of authority to the governor was "mostly intended" to apply to the Civil Administrative Code departments.<sup>226</sup>

While most of the first reading debate was limited to the technical aspects of the timing for legislative consideration of any executive order causing agency reorganization, there are aspects of the debate which illuminate the delegates' various views on the meaning of the provision. The term "agency" includes departments. In fact, Chairman Tecson commented that the code departments are those "agencies" which are responsible to the governor.<sup>227</sup> This is certainly a more restrictive view of the scope of agency reorganization than has been demonstrated in the first set of comprehensive reorganization proposals forwarded by Governor Thompson to the legislature.<sup>228</sup> The delegates also indicated that any executive order submitted by the governor under this provision would not be subject to legislative amendment; rather, the legislature must either approve or disapprove the executive order reorganization proposal in its entirety.<sup>229</sup> Finally, two delegates on the EAC noted that reorganization proposals were to be received early in a legislative session in order to allow them to receive close scrutiny by the legislature before the burden of other legislative business precluded such a review.<sup>230</sup>

There were no amendments to this section on first reading.<sup>231</sup> The delegates voted 64 to 4 to submit the agency reorganization provision to the Style, Drafting and Submission Committee for technical revision.<sup>232</sup>

On second reading, after details relating to the submission and consideration of reorganization orders were clarified by the Style, Drafting and Submission Committee, a substantively unchanged agency reorganization section<sup>233</sup> was more vigorously debated by the

---

226. *Id.*

227. *Id.* at 1329.

228. See text accompanying notes 250 through 268 *infra*.

229. RECORD OF PROCEEDINGS, *supra* note 213, vol. III at 1330.

230. See *id.* at 1329 (comments of Delegate R. Smith) and *id.* at 1328 (comments of Delegate Young).

231. *Id.* at 1331 and ANALYSIS OF AMENDMENTS ON FIRST READING TO THE PROPOSED EXECUTIVE ARTICLE, Committee Memorandum No. 27 at 3, Illinois State Historical Library, Springfield, Illinois.

232. RECORD OF PROCEEDINGS, *supra* note 213, vol. III at 1331.

233. The section considered by delegates on Second Reading provided as follows:

*Agency Reorganization.* The Governor, by Executive Order, may reassign functions among or reorganize executive agencies which are directly responsible to him. If such a reassignment or reorganization would contravene a statute, the Executive Order shall be delivered to the General Assembly. If the General Assembly is in regular session and if the Executive Order is delivered on or before April 1, the

Con-Con delegates. In discussing an amendment submitted by Delegate Elward which would have deleted the section in its entirety, more of the delegates' philosophical and practical views of the proposal came to light.<sup>234</sup> For example, Delegate Netsch in arguing for the provision's inclusion in the executive article stated that "if, indeed, we are willing to give the governor some reorganization power, . . . I believe that it does require some constitutional authorization."<sup>235</sup> Delegate Elward vigorously opposed the inclusion of the agency reorganization provision in the Executive Article on the grounds that the procedure for such gubernatorial action reversed the traditional legislative process and gave too much control to the state's chief executive.<sup>236</sup> On the other hand, one EAC member noted that the citizens of Illinois wanted a "strong governor" and that this provision was one of the ways in which that interest could be served.<sup>237</sup> Delegate Elward expressed the fear that the provision allowed a reorganization plan to go into effect after the "automatic ticking of the clock—with the passage of the 60 days—without there ever having been a yes or no vote in either house."<sup>238</sup> Thus, by defeating the Elward amendment,<sup>239</sup> the Con-Con endorsed the no-

---

General Assembly shall consider the Executive Order at that regular session. If the General Assembly is not in regular session or if the Executive Order is delivered after April 1, the General Assembly shall consider the Executive Order at its next regular session in which case the Executive Order shall be deemed to have been delivered on the first day of that regular session. Such an Executive Order shall not become effective if, within 60 calendar days after its delivery to the General Assembly, either house disapproves the Executive Order by the vote of a majority of all the members by yeas and nays entered upon its journal. An Executive Order not so disapproved shall become effective by its terms but not less than 60 calendar days after its delivery to the General Assembly.

Committee on Style, Drafting and Submission, *Proposal No. 6* in RECORD OF PROCEEDINGS, *supra* note 213, vol. VI at 413, 422-23.

234. RECORD OF PROCEEDINGS, *supra* note 213, vol. V at 3748-54.

235. *Id.* at 3751. See ILL. CONST. art. II, § 1 (1970). There is no question but that a statute permitting the same authority on behalf of the governor would be adequate to effectuate executive reorganization. See note 127 *supra*, and text accompanying notes 127 through 179 *supra*. At the same time, however, it is far easier to revoke any grant of legislative authority to reorganize than it is to amend the constitution to delete such power. *But see* D. NETSCH, THE EXECUTIVE IN CON-CON, ISSUES FOR ILLINOIS CONSTITUTIONAL CONVENTION 175 (1970); compare REPORT OF THE COMMISSION ON STATE GOVERNMENT—ILLINOIS—TO THE GENERAL ASSEMBLY AND THE GOVERNOR, General Organization and Management, Recommendation #19 at 9, which called for a statutory agency reorganization provision. A constitutional basis for executive reorganization may also insulate to some degree that process from challenges based upon separation of powers arguments to which purely legislative authority may be vulnerable.

236. RECORD OF PROCEEDINGS, *supra* note 213, vol. V at 3751, 3753-54.

237. See *id.* at 3752 (comments of Delegate Friedrich).

238. *Id.* at 3751.

239. *Id.* at 3754. The Elward amendment was defeated by a vote of 50-33.

tion that the legislature must affirmatively disapprove any plan in order to prevent it from being implemented with the force and effect of law.<sup>240</sup> The agency reorganization provision was adopted on second reading<sup>241</sup> and finally approved by the delegates as part of the entire executive article.<sup>242</sup>

#### EXECUTIVE REORGANIZATION IN ILLINOIS: AFTER 1970

The Illinois Constitution now provides:

The Governor, by Executive Order, may reassign functions among or reorganize executive agencies which are directly responsible to him. If such a reassignment or reorganization would contravene a statute, the Executive Order shall be delivered to the General Assembly. If the General Assembly is in annual session and if the Executive Order is delivered on or before April 1, the General Assembly shall consider the Executive Order at that annual session. If the General Assembly is not in annual session or if the Executive Order is delivered after April 1, the General Assembly shall consider the Executive Order at its next annual session, in which case the Executive Order shall be deemed to have been delivered on the first day of that annual session. Such an Executive Order shall not become effective if, within 60 calendar days after its delivery to the General Assembly, either house disapproves the Executive Order by the record vote of a majority of the members elected. An Executive Order not so disapproved shall become effective by its terms but not less than 60 calendar days after its delivery to the General Assembly.<sup>243</sup>

Since July, 1971, three Illinois governors have had the opportunity to initiate executive reorganization under this constitutional authority. However, only the current governor, James R. Thompson, has utilized this provision of the 1970 Constitution.<sup>244</sup>

---

240. See generally HOUSE SELECT COMMITTEE ON STATE GOVERNMENT ORGANIZATION, MAJORITY REPORT ON EXECUTIVE ORDER 1977-2 (1977), discussed at text accompanying notes 272 through 283 *infra*.

241. RECORD OF PROCEEDINGS, *supra* note 213, vol. V at 3755.

242. The entire Executive Article was approved by a vote of 100 "yeas," 2 "nays," and one "present." RECORD OF PROCEEDINGS, *supra* note 213, vol. V at 4344.

243. ILL. CONST. art. V, § 11, ratified by the voters of the State of Illinois December 15, 1970, effective July 1, 1971. ILL. CONST. Adoption Schedule § 1.

244. In Exec. Order 1976-4, Governor Dan Walker expressly relied on the first sentence of the constitutional provision to transfer the authority over regional and local port districts, and related grant programs from the Department of Business and Economic Development to the Department of Transportation. Illinois Exec. Order No. 1976-4, Gov. Dan Walker, October 1, 1976, Springfield, Illinois. The order noted that the transfer contravened no state statute, and accordingly was not subject to legislative disapproval. During the 13 months between the effective date of the 1970 constitution and the conclusion of the administration of Governor Richard B. Ogilvie, the Governor did not utilize the constitutional reorganization

*Reorganization Executive Orders of Governor Thompson*

During the gubernatorial campaign of 1976, the reorganization of Illinois' executive branch of government was brought to the electorate's attention.<sup>245</sup> Both major party candidates, Thompson and Secretary of State Michael Howlett, agreed that reorganization of state government was a priority of the next administration and, accordingly, appointed the Illinois Task Force on Governmental Reorganization.<sup>246</sup> The Task Force was directed to "develop recommendations for organizing the executive branch of state government."<sup>247</sup> Financed by the contributions of Illinois labor unions, corporations, and banks,<sup>248</sup> the Task Force, under the direction of Charles W. Bonniwell, produced a lengthy report focusing on the reorganization of Illinois' twenty-two Code departments, forty-three major agencies, and the nearly two hundred and fifty smaller boards, advisory boards, and commissions.<sup>249</sup>

---

provision, though he clearly was interested in reorganization and may have effectuated the same during a second term had he won the election. Bonniwell Report, *supra* note 180, at 34 (citing "Beyond Bureaucracy," a staff report to Governor Ogilvie, by John Briggs, 1973 [recommendations were published after Ogilvie's defeat and were not implemented]). Executive orders are not otherwise constitutionally provided for in Illinois. See generally Favoriti, *Executive Orders—Has Illinois a Strong Governor Concept?*, 7 LOY. CHI. L.J. 295 (1976); Favoriti, *Executive Power Under the New Illinois Constitution: Field Revisited*, 6 J. MAR. J. PRAC. & PROC. 235 (1973). The Illinois Supreme Court has upheld one Walker executive order in *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied*, 419 U.S. 1058 (1974). There the court held that the Illinois Exec. Order 1973-4, creating a Board of Ethics and requiring the filing of statements of economic interest as provided in ILL. CONST. art. XIII, § 2, did not fall within the ambit of an article V, section 11 agency reorganization:

The plaintiffs also contend that the executive order is invalid because it was not submitted to the General Assembly before it became effective. This contention is based upon section 11 of article V, which authorizes the Governor to "reassign functions among or reorganize executive agencies which are directly responsible to him." The section continues: "If such a reassignment or reorganization would contravene a statute, the Executive Order shall be delivered to the General Assembly." The plaintiffs do not identify any statute that they contend has been contravened by the order, and we are aware of none. The authority of the Governor to adopt this order is granted by section 2 of article XIII, which has been set forth.

*Id.* at 519, 315 N.E.2d at 13.

The Illinois Supreme Court held that Governor Walker exceeded his authority in issuing an executive order on one occasion. *Buettell v. Walker*, 59 Ill. 2d 146, 319 N.E.2d 502 (1974).

Both Governors Ogilvie and Walker issued a number of executive orders—Ogilvie issuing 32, and Walker 28, during their four year terms. During the first eleven months of a two year term, Governor Thompson has issued seven executive orders. See also House Bills 101 and 1624, and Senate Bills 159 and 458, 80th General Assembly, discussed at text accompanying note 291 *infra*.

245. See, e.g., THOMPSON ON THE ISSUES—GOVERNMENT REORGANIZATION, Campaign Statement (1976).

246. Bonniwell Report, *supra* note 180, at iii.

247. *Id.*

248. *Id.* Appendix C, at 343-44.

249. *Id.* at 1.

Three months into his term in office, Governor Thompson began to implement portions of the Bonniwell Report, utilizing the executive order reorganization provision of the Illinois Constitution. On March 31, 1977, he delivered to both houses of the Illinois General Assembly two executive orders effecting functional reorganization in parts of Illinois state government.<sup>250</sup>

By Executive Order No. 1, Thompson ordered the creation of a Department of Administrative Services, and transferred to it the powers and functions of the existing Departments of Finance and General Services.<sup>251</sup> This action, implementing the Bonniwell recommendation which called for the creation of a centralized agency to provide support services to the agencies of Illinois government,<sup>252</sup> was intended to "consolidate procurement, property management, printing, accounting, data processing and risk management into a single administrative agency."<sup>253</sup>

All the powers, duties and rights previously vested in the Departments of Finance and General Services, including any divisions or bureaus of these code departments, were transferred to this new department.<sup>254</sup> Personnel previously assigned to the two abolished departments were transferred to the new Department of Administrative Services with the admonition that both the "rights of the [newly-created] Department and its employees under the personnel code shall not be affected" by the reorganization.<sup>255</sup> A savings provision insured that any regulations promulgated by the Depart-

---

250. "An Executive Order Creating the Department of Administrative Services and Transferring to it the Powers of the Department of Finance and the Department of General Services," Illinois Executive Order 1977-1, James R. Thompson, March 31, 1977 [hereinafter cited as Exec. Order No. 1]; *Journal of the House of Representatives*, 80th Illinois General Assembly 852 (March 31, 1977); *Journal of the Senate*, 80th Illinois General Assembly 8 (April 6, 1977); and "An Executive Order Reorganizing the Department of Law Enforcement," Illinois Executive Order 1977-2, James R. Thompson, March 31, 1977 [hereinafter cited as Exec. Order No. 2]; *Journal of the House of Representatives*, 80th Illinois General Assembly 847 (March 31, 1977); *Journal of the Senate*, 80th Illinois General Assembly 12 (April 6, 1977).

251. Exec. Order No. 1, *supra* note 250, at § 1 (A) and § II (A). *Journal of the House of Representatives*, 80th Illinois General Assembly 852 (March 31, 1977); *Journal of the Senate*, 80th Illinois General Assembly 8-9 (April 6, 1977).

252. Bonniwell Report, *supra* note 180, at 5, 85-110.

253. *Journal of the House of Representatives*, 80th Illinois General Assembly 852 (March 31, 1977); *Journal of the Senate*, 80th Illinois General Assembly 8 (April 6, 1977).

254. *Id.*

255. Exec. Order No. 1, *supra* note 250, at § III (C). *Journal of the House of Representatives*, 80th Illinois General Assembly 855 (March 31, 1977); *Journal of the Senate*, 80th Illinois General Assembly 11 (April 6, 1977). See also Havemann, *Can Carter Chop Through the Civil Service System*, National Journal 616-26 (April 23, 1977) for an extensive discussion of the impact on personnel regulation of executive reorganization at the federal level. See House, *Balky Bureaus—Civil Service Rulebook May Bury Carter's Bid to Achieve Efficiency*, Wall St. J., (Midwest Edition), Sept. 26, 1977, at 1, col. 1.

ments of Finance and General Services would continue in force and would be deemed regulations of the new Department of Administrative Services.<sup>256</sup>

Executive Order No. 2 reorganized the Department of Law Enforcement.<sup>257</sup> It divided the Department into five divisions<sup>258</sup> and established a unified personnel system for sworn law enforcement officers.<sup>259</sup> The Order further consolidated all investigative functions into two divisions with defined and non-overlapping responsibilities.<sup>260</sup> The reorganization, according to the Order, would eliminate duplication in communications' systems, personnel management, and fiscal management.<sup>261</sup> Furthermore, it stated that the reorganization would allow the Department "to increase its responsibilities for the enforcement of laws affecting narcotics, organized crime, governmental fraud, and financial crime. . . ."<sup>262</sup>

The Executive Order created a Department of Law Enforcement Merit Board to replace the abolished State Police Merit Board.<sup>263</sup> The Director of the Department of Law Enforcement was authorized to appoint and promote investigators for a limited period of time.<sup>264</sup> Bureau of Investigation employees, previously subject to the Personnel Code,<sup>265</sup> were placed under the jurisdiction of the Department of Law Enforcement Merit Board.<sup>266</sup> Finally, the Order eliminated the Merit Board's authority to increase disciplinary penalties in cases involving appeals from Board suspensions.<sup>267</sup> These are

---

256. Exec. Order No. 1, *supra* note 250, at § IV (C). Other savings provisions guaranteed that documents and legal notices required to be served on the abolished departments would, subsequent to the effective date of the order, be required to be served upon the new Department of Administrative Services, Exec. Order No. 1, *supra* note 250, at § IV (A); that no rights accrued or existing in any judicial proceeding involving the abolished departments be affected, *id.* at § IV (B); and that the appropriations for the abolished agencies be transferred to the new department, *id.* at § IV (D).

These "savings provisions" are comparable to statutory requirements of executive reorganization in New Jersey, N.J. STAT. ANN. §§ 52:14C-9, 10 (West 1970); California, CAL. GOV'T CODE § 12080.7 (West Supp. 1977); Pennsylvania, PA. STAT. ANN. tit. 71, § 750-8 (Purdon 1962).

257. See note 250 *supra*.

258. Exec. Order No. 2, *supra* note 250, at § I (A). *Journal of the House of Representatives*, 80th Illinois General Assembly 848 (March 31, 1977); *Journal of the Senate*, 80th General Assembly 13 (April 6, 1977).

259. Exec. Order No. 2, *supra* note 250, at § III (B) (1) and (2).

260. *Id.* at § II (B) and (E).

261. *Id.* *Journal of the House of Representatives*, 80th Illinois General Assembly 847 (March 31, 1977); *Journal of the Senate*, 80th Illinois General Assembly 13 (April 6, 1977).

262. Exec. Order No. 2, *supra* note 250, at § II (B) and (E).

263. *Id.* at § III.

264. *Id.* at § III (B) (2) (a).

265. ILL. REV. STAT. ch. 127, §§ 63b101-119 (1975).

266. Exec. Order No. 2, *supra* note 250, at § III (B).

267. *Id.* at § III (B) (2) (c).

among the most controversial elements of this Executive Order.<sup>268</sup>

### *The Legislative Response*

The leadership of both the House of Representatives and the Senate created committees for the purpose of reviewing the executive order reorganizations.<sup>269</sup> With staff support, the House select committee actively reviewed the two Thompson executive orders. The first order was approved by the committee and comprehensive legislation, codifying the terms of Executive Order No. 1, has been signed by the Governor.<sup>270</sup>

The House committee's review of Executive Order No. 2 reached significantly different conclusions.<sup>271</sup> This development poses interesting, and undoubtedly recurring, questions regarding executive reorganization by executive order in Illinois.

In voting to submit a resolution of rejection to the full House, the majority of the House Select Committee on State Government Organization articulated a number of significant problems with Executive Order No. 2.<sup>272</sup> That resolution was defeated in the House by an 82-79 margin.<sup>273</sup> As a practical matter, the General Assembly's eventual adoption of legislation codifying much of the substance of Executive Order No. 2,<sup>274</sup> and Governor Thompson's approval of such legislation,<sup>275</sup> moots these arguments regarding the law enforcement reorganization.

First, the Committee expressed doubt whether the abolished State Police Merit Board was "an agency directly responsible to the Governor."<sup>276</sup> The Committee majority report pointed to analogies

---

268. Many of the structural changes noted were consistent with Bonniwell Report suggestions. See Bonniwell Report, *supra* note 180, at 271-96. Additionally, the savings provisions of Exec. Order No. 2 provided for the transfer of appropriations to the newly created division and board, § V(B), and continuation of any judicial proceeding unimpeded by the executive order, § V(A).

269. See Chi. Sun-Times, May 19, 1977, at 12, col. 1.

270. Administrative Services Department, Pub. Act 80-57, 1977 Ill. Legis. Serv. 171 (West), signed by Governor Thompson, July 1, 1977 and effective that date.

271. HOUSE SELECT COMMITTEE ON STATE GOVERNMENT ORGANIZATION, MAJORITY REPORT ON EXECUTIVE ORDER NO. 2 (1977).

272. *Id.*

273. *Journal of the House of Representatives*, 80th Illinois General Assembly 3497 (May 26, 1977); Chi. Daily News, May 27, 1977, at 5, col. 4; Chi. Sun-Times, May 27, 1977, at 12, col. 1.

274. House Bill No. 2397, 80th Illinois General Assembly (1977), approved by the General Assembly June 29, 1977 and sent to the Governor. LEGISLATIVE SYNOPSIS AND DIGEST, No. 21, 80th Illinois General Assembly 2372 (1977).

275. Law Enforcement Department—Reorganization, Pub. Act 80-56, 1977 Ill. Legis. Service 155 (West), signed by Governor Thompson on July 1, 1977 and effective that date.

276. HOUSE SELECT COMMITTEE ON STATE GOVERNMENT ORGANIZATION, MAJORITY REPORT ON EXECUTIVE ORDER NO. 2 at 6 (1977).

between the State Police Merit Board and the Illinois Industrial and Commerce Commissions<sup>277</sup> to support this view. Those similarities are:

1. All members (of the State Police Merit Board) are appointed by the governor subject to the advice and consent of the Senate.
2. The Board is statutorily outside the Civil Administrative Code, and is not a code department. The members of the State Police Merit Board are not code officers.
3. Members' terms do not coincide with the term of the Governor.
4. All three exercise quasi-judicial functions.<sup>278</sup>

The majority also objected to the creation, by executive order, of authority in the Director of the Department of Law Enforcement to appoint and promote investigators, stating that such an order created "a discretionary power not presently granted to anybody."<sup>279</sup> Additionally, the report noted with concern the transfers of Illinois Bureau of Investigation employees from coverage under the Personnel Code to the Department of Law Enforcement Merit Board. The majority stated that this was a "dubious . . . reassignment of functions," but was instead a "transfer of personnel to a different body of substantive personnel law."<sup>280</sup> Furthermore, the addition of personnel not previously covered by either the state Personnel Code or the State Police Merit Board to the jurisdiction of the Department of Law Enforcement Board was, in the Committee's view, the creation of a new power not authorized by the constitution.<sup>281</sup> Finally,

---

277. See Letter to Representatives James M. Houlihan and Douglas Kane, Co-Chairmen, House Select Committee on State Government Organization, from William R. Wallin, Assistant Attorney General, May 11, 1977 at 3. In that letter, Mr. Wallin responds to the Committee's question concerning what agencies are directly responsible to the Governor by citing Executive Article Committee Chairman Tecson's comments on that issue at the time of the Con-Con's first reading of the agency reorganization section as follows:

Your final question is:

What is the appropriate definition of an executive agency directly responsible to the Governor under Article V, Section 11 of the Illinois Constitution? Based on my reading of the verbatim transcripts, those agencies considered to be directly responsible to the Governor include the code departments and possibly additional agencies, however, they do not include agencies under the legislative or judicial branches or those responsible to other constitutional offices. Agencies such as the Commerce Commission and the Industrial Commission are probably not included. [RECORD OF PROCEEDINGS, vol. III at 1327-28] Whether other agencies are under the direct control of the Governor should be considered at the time the Governor proposed to reorganize them.

278. HOUSE SELECT COMMITTEE ON STATE GOVERNMENT ORGANIZATION, MAJORITY REPORT ON EXECUTIVE ORDER No. 2 at 7 (1977).

279. *Id.*

280. *Id.* at 8.

281. *Id.*

insofar as the executive order abolished the capacity of the Merit Board to increase disciplinary penalties in instances where there were appeals from board decisions, the Committee noted that this was a change in substantive law.<sup>282</sup>

When the Committee's proposal of rejection was considered by the House, it was defeated by the slightest of margins.<sup>283</sup> The governor and his staff actively lobbied for the proposal's defeat. The comprehensive legislative package codifying the changes made by Executive Order No. 2 was passed by the General Assembly and signed into law by Governor Thompson on July 1.<sup>284</sup> Thus, whatever infirmities were envisioned by the majority and no matter how sound those theories were, the arguments are obviated by the passing of legislation.<sup>285</sup>

In addition to its consideration of these Executive Orders, the Eightieth Illinois General Assembly was active in other aspects of state government reorganization. In May of 1977, the House Select Committee on Government Organization introduced a comprehensive proposal to reorganize the state's energy and mineral-related departments.<sup>286</sup> The proposal created a Department of Mines and Energy, transferring to it the energy-related functions currently exercised by the Department of Business and Economic Development and all of the functions now assigned to the Department of Mines and Minerals, its Land Reclamation and Oil and Gas Divisions, and the Illinois State Mining Board.<sup>287</sup> This reorganization legislation was developed by the House Select committee, independently of the Governor's office. Both chambers approved the bill and sent it to the Governor for his signature. In a September, 1977, amendatory veto message to the Senate, Governor Thompson indicated his ap-

---

282. *Id.* Despite the fact that this is a change in substantive law effectuated by an executive order, it should be mentioned that the effect of this change is to correct a constitutional infirmity present in the statute prior to the executive order.

A minority report was filed urging that the resolution of rejection, H.R. 274, not be adopted by the House of Representatives. HOUSE SELECT COMMITTEE ON GOVERNMENT ORGANIZATION, MINORITY REPORT ON EXECUTIVE ORDER No. 2 (undated). In that report, the committee minority takes the position that article V, section 11 authorizes the governor to abolish or create functions by a reorganization executive order. *Id.* at 10-11. This is the only report to reach such a conclusion, and the minority report cites no authority in support of this position.

283. See text accompanying note 273 *supra*.

284. See text accompanying notes 274 and 275 *supra*.

285. See text accompanying note 295 *infra*.

286. House Bill No. 2401, 80th Illinois General Assembly introduced May 20, 1977. Although this bill was placed on the Select Committee's Study Calendar on June 15, 1977, LEGISLATIVE SYNOPSIS AND DIGEST, No. 21 at 2375 (July 15, 1977), and effectively tabled in that form, its provisions were preserved as House Amendment No. 1 to Senate Bill No. 1142, which, as amended, was passed by both houses.

287. House Bill No. 2401, 80th Illinois General Assembly (1977).

proval of this reorganization but deferred its effective date to July 1, 1978. In the 1977 fall veto session of the General Assembly, both houses concurred with the Governor's amendatory veto.

Other legislative initiatives relevant to agency reorganization were undertaken by the General Assembly during its most recent regular session. While none met the same success of the energy reorganization plan, the terms of these proposals indicate areas where legislation may be utilized to further limit reorganization under article V, section eleven.

One proposal<sup>288</sup> would have defined constitutional reorganization to include "[a]ny change of name, transfer of function, definition, redefinition, or addition to the objectives, functions, or programs" of any agency responsible to the governor as an "agency reorganization" under article V, section eleven of the Illinois Constitution.<sup>289</sup> Whether this definition of constitutional authorization to the executive would be deemed by the courts to be consistent with the constitutional provision is a question for future consideration, as the Senate failed to act on this House bill.<sup>290</sup> Other unsuccessful bills had sought to limit the effectiveness of executive orders past the term of the governor promulgating them, unless specifically adopted by the successor governor.<sup>291</sup> These bills excluded agency reorganization executive orders under article V, section eleven.<sup>292</sup>

### *The Future*

The Thompson Administration held public hearings on the Bonniwell Report in six Illinois cities in May of 1977 and a hearing panel has recommended adoption of the Bonniwell Report and emphasis on effective "organization" of state government as well as reorganization by the Thompson Administration.<sup>293</sup>

---

288. House Bill No. 1543, 80th Illinois General Assembly (1977).

289. *Id.*

290. LEGISLATIVE SYNOPSIS AND DIGEST, No. 21 at 1871 (July 15, 1977).

291. Senate Bill No. 159, Senate Bill No. 458, House Bill No. 101 and House Bill No. 1624, 80th Illinois General Assembly (1977). These bills were identical in their terms, providing in relevant part as follows:

Section 1. Each executive order issued by a Governor and filed with the Secretary of State under Section 6a of "An Act to Revise the Law in Relation to the Secretary of State", approved March 30, 1874, as now or hereafter amended, is null and void 60 days after the inauguration of a new Governor unless within this 60 day period the new Governor issues an order extending such prior executive order . . .

Section 3. This Act does not apply to executive orders issued under Section 11 of Article V of the Constitution.

292. *Id.*

293. Chi. Tribune, April 28, 1977, § 3 at 13, col. 6; Chi. Sun-Times, April 7, 1977, at 36, col. 1. Johnson, Monat, Schilf, Findings of the Public Hearings Panel on Executive Branch Reorganization (September 26, 1977).

*Analysis of Article V, Section Eleven Powers and Limitations*

While the Illinois Supreme Court has identified a situation in which an Executive Order does not fall within the purview of article V, section eleven,<sup>294</sup> it has not been called upon to review an article V, section eleven reorganization. Because curative legislation<sup>295</sup> gave the first two constitutional executive reorganizations the full force of statutory enactments, the initial uses of this device by an Illinois chief executive are not likely to be challenged.

However, significant questions remain as to the article V, section eleven process and the reorganization of Illinois government by executive order.

Three such questions are: (1) which agencies are "directly responsible" to the Governor and therefore susceptible to article V, section eleven reorganization; (2) when does an executive order "contravene a statute" thereby subjecting the order to legislative scrutiny; and (3) does the authority to "reassign functions" and "reorganize . . . agencies" include the power to create or abolish agency functions. None of these questions has either been considered by Illinois appellate courts, nor the subject of a definitive Illinois Attorney General's opinion.<sup>296</sup> No legislation defining the scope of an article V, section eleven reorganization has been approved<sup>297</sup> by the General Assembly. Moreover, the record made by Con-Con—to the extent that it is representative of the delegates' collective views<sup>298</sup>—is essentially inconclusive on all three questions.<sup>299</sup>

However, in two recent decisions,<sup>300</sup> the Illinois Supreme Court

294. *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9 (1974) (an executive order that certain employees file financial disclosure statements was held not to contravene existing law and thereby did not fall within the purview of article V § 11).

295. Pub. Acts 80-56 and 80-57 (1977).

296. See letter to Representatives James M. Houlihan and Douglas Kane, Co-Chairmen, House Select Committee on State Government Organization, from William Wallin, Assistant Attorney General, May 11, 1977, at note 277 *supra*.

297. See text accompanying notes 288 through 290 *supra*. In § 1 of House Bill No. 1543 it was proposed that "[a]ny . . . addition to the . . . functions . . . of any executive agency directly responsible to the Governor is an agency reorganization. . . ." House Bill No. 1543, 80th Illinois General Assembly § 1. It is doubtful that this portion of the proposed law was consistent with the provisions of article V, § 11, which authorizes the Governor to "reassign functions" and "reorganize executive agencies," ILL. CONST. art. V, § 11, not relating "to substantive policy." See text accompanying note 220 *supra*.

298. For an extensive analysis of the Illinois Supreme Court's use of the Con-Con proceedings in construing the 1970 Constitution, see Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of The Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. PRAC. & PROC. 189 (1975).

299. See, e.g., EAC Chairman Tecson's statements that article V, § 11 was "mostly intended" to apply to the Code departments, at text accompanying note 226 *supra*.

300. *King v. Lindberg*, 63 Ill. 2d 159, 345 N.E.2d 474 (1976); *Walker v. State Board of Elections*, 65 Ill. 2d 543, 359 N.E.2d 113 (1976).

has articulated a standard for determining what constitutes an "officer of the executive branch" and this reasoning could well serve as a guide in construing which agencies are directly responsible to the governor. In *King v. Lindberg*, a State Fair Board appointed primarily by various legislative leaders, was held violative of the Illinois constitutional provision prohibiting the General Assembly from "elect[ing] or appoint[ing] officers of the Executive Branch."<sup>301</sup> In determining that the statute fell within the article V, section nine prohibition, the court stated:

The primary function of the permanent board is to supervise and operate the State Fair, and this is clearly an executive function. . . . In determining whether an officeholder is an "officer of the Executive Branch," *we must give the greatest consideration to his predominant or primary duties.*<sup>302</sup>

In *Walker v. State Board of Elections*, the supreme court examined the intent of the Con-Con delegates as expressed in the convention record,<sup>303</sup> to support its finding that members of the State Board of Elections were article V executive officers. Acknowledging that this Board had some quasi-judicial and quasi-legislative functions, the court cited with approval the *King v. Lindberg* guidelines and determined that its duties were principally executive.<sup>304</sup>

By analogy, the question of whether a unit of state government is an "agency directly responsible" to the governor could well turn on whether that entity exercises predominantly executive functions—that is, supervisory, administrative, and primarily non-discretionary functions. By comparison, the statement that the Illinois Commerce and Industrial Commissions are outside the scope

---

301. ILL. CONST. art. V, § 9(a) provides:

The Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose election or appointment is not otherwise provided for. Any nomination not acted upon by the Senate within 60 session days after the receipt thereof shall be deemed to have received the advice and consent of the Senate. The General Assembly shall have no power to elect or appoint officers of the Executive Branch.

The Act, passed over Governor Walker's veto, established a 15 member State Fair Board whose initial members were chosen by the Speaker and Minority Leader of the House, the President and Minority Leader of the Senate, and the Governor. Each of these 5 persons appointed 3 members on an interim basis. Pub. Act 79-1129, 1975 Ill. Laws 3469.

302. 63 Ill. 2d at 163-64, 345 N.E.2d at 476 (emphasis added).

303. See text at note 298 *supra*.

304. 65 Ill. 2d at 561, 359 N.E.2d at 122. In *Walker*, the court held that the provisions of Public Act 78-918 requiring that the Governor appoint members of the Board of Elections solely from nominees designated by the Speaker and Minority Leader of the House and the President and Minority Leader of the Senate was unconstitutional. The court also noted the Con-Con debates where Delegate Keegan stated that the State Board of elections would be part of the Executive Branch. *Id.* at 562, 359 N.E.2d at 122.

of the article V, section eleven reorganization is undoubtedly premised on the fact that these commissions have extensive (and almost exclusively) adjudicatory and rulemaking functions. Applying this functional analysis, other state agencies with functions such as those of the Pollution Control Board<sup>305</sup> and the Mining Board<sup>306</sup> would fall outside the ambit of the reorganizational authority. But for the passage of Public Act 80-56,<sup>307</sup> Governor Thompson's abolition of the State Police Merit Board in Executive Order No. 2 may well have been held to be beyond the scope of article V, section eleven as that Board's duties are primarily adjudicatory.<sup>308</sup>

When does a reorganization executive order contravene a statute, necessitating legislative review? Quite possibly this occurs whenever an order modifies, changes, or alters a statute, as well as when one supersedes, contradicts or negates a law. The framers of the executive article strongly suggest that reorganization is a joint executive branch-legislative branch enterprise, with the power to initiate changes vested in the governor, subject to the reviewing authority of the General Assembly.<sup>309</sup> The Style, Drafting and Submission Committee substituted the word "contravened" for "modified" on second reading,<sup>310</sup> and there is no intimation anywhere in the record that this change was intended to be a substantive one. Absent defining legislation, only when the General Assembly is bypassed in the reorganization process will the test of this provision take place.

Finally, there is the strong suggestion that reorganization was not intended to be a vehicle for adding or eliminating substantive functions to executive agencies. The mechanism was certainly intended to reverse the legislative process, only with respect to "organizational forms and placement" of executive agencies.<sup>311</sup> Undoubtedly, adjusting the "form" of government will frequently have a substantive impact; the adding or abolition (as opposed to reassignment) of functions would seem to be outside the scope of the reorganization section. In this regard, Executive Order No. 2—to the extent that it vested new promotional authority in the Director

---

305. ILL. REV. STAT. ch. 111-1/2 § 1005 (1975).

306. ILL. REV. STAT. ch. 93 §§ 2.01 *et seq.* (1975). The Mining Board is responsible for promulgating health and safety rules and regulations, *id.* at § 2.12, for promulgating procedural rules governing the conduct of its own hearings, *id.* at § 2.14, and for adjudicating disputes between miners and mine operators, *id.* at § 2.13, among other functions.

307. See text accompanying notes 274 through 275 *supra*.

308. See, e.g., ILL. REV. STAT. ch. 121, §§ 307.13, 14 (1975).

309. RECORD OF PROCEEDINGS, *supra* note 213, vol. VII at 389. See text accompanying notes 216 through 220 *supra*.

310. See text accompanying notes 215 and 233 *supra*.

311. RECORD OF PROCEEDINGS, *supra* note 213, vol. VII at 390.

of the Department of Law Enforcement and eliminated a penalty provision<sup>312</sup>—may well represent an overstepping of the Governor's reorganization power.

All three questions require the adoption of definitional legislation. Some jurisdictions have both defined which agencies are susceptible to reorganization,<sup>313</sup> and designated what is permissible reorganization,<sup>314</sup> and the legislature certainly can lend some definition to the issue of when an executive order contravenes a statute. While any such legislation would ultimately be subject to judicial scrutiny, such a "broad-brush" constitutional provision demands clarification to allow implementation.

Finally, legislation should be adopted requiring that any reorganization executive order not disapproved by the General Assembly be published alongside the session laws.<sup>315</sup> This would eliminate confusion and uncertainty as to the substance and statutory effect of any reorganization plan.

#### CONCLUSION

Whatever the Illinois Supreme Court's eventual determination of the limitations upon or scope of the Executive's power to reorganize, the inherent power of the legislature to reorganize by statute and the political dimension of "reorganization"<sup>316</sup> are such that these political factors may have a greater influence upon the future of executive reorganization than will the Illinois Supreme Court's construction of the phrase "directly responsible to the Governor."

312. See text accompanying notes 264 and 267 *supra*.

313. See, e.g., S.C. CODE § 1-19-40 (1976) which states in part:

When used in this chapter the term "agency" or the term "executive and administrative agency" . . . shall mean any executive or administrative department, commission, board, bureau, division, service, office, officer, authority, administration or corporate entity which is an instrumentality of the State or any other establishment having executive or administrative functions in the government of the State.

See also CAL. GOV'T CODE § 12080(a) (Supp. 1977); N.J. STAT. ANN. § 52:14C-3(a) (West 1970), and treatment of a comparable issue by the Alaska court at text accompanying notes 86 through 89 *supra*.

314. See, e.g., CAL. GOV'T CODE § 12080(b) (Supp. 1977); 1955 Pa. Laws ch. 5, 71 § 750-4.

315. Amendments to ILL. REV. STAT. ch. 127, § 132.230 and ch. 131 (1975) would be required to achieve the desired result. See text accompanying notes 297 and 288 through 290 *supra*.

316. Further factors affecting any reorganizational efforts are the political demands of new constituencies for the creation of new and special agencies and departments and the creation of new agencies responsive to a specific crisis. See, e.g., "Report urges a new agency for disabled," Chi. Daily News, August 1, 1977, at 28, col. 3, reporting the results of a special investigation by the Illinois Department of Law Enforcement on abusive treatment of children by a foster home.

Reorganization, whether by the executive or by statute, is a political tool and means for allocating priorities and resources.<sup>317</sup> The term reorganization lately has been viewed as synonymous with efficiency and economy and any candidate or faction promising to reorganize the federal or any state bureaucracy has found a ready following.<sup>318</sup> There is no doubt that reorganization of government may affect the distribution of resources and functions. However, whether economy results from reorganization is open to considerable question.<sup>319</sup> The reality is that any Illinois governor will be able to reorganize by executive order only if the reorganization will not affect any vested constituency, and if the executive has sufficient political power to impose his will on the legislature in the face of opposition to his proposed reorganization.<sup>320</sup>

A more important factor in the development of executive reorganization is the inherent legislative power vested in the General Assembly.<sup>321</sup> The legislature may always reorganize by statute, and major reorganizations have been effected through full statutory authorization from the legislature.<sup>322</sup> While legislative bodies have frequently been overshadowed by the executive branch,<sup>323</sup> recent incursions by the General Assembly in the executive domain may mean a change in the developed roles of the executive and the legislature.<sup>324</sup> In the reorganization area, where the issue is significant from

317. Miles, *Considerations for a President Bent on Reorganization*, 37 PUB. AD. REV. 155, 157 (1977).

318. See text accompanying notes 11 and 245 and see note 59 *supra*.

319. See Miles, *Considerations for a President Bent on Reorganization*, 37 PUB. AD. REV. 155, 162 (1977). President Roosevelt is quoted as stressing managerial rather than economic reasons for reorganization: "We have got to get over the notion that the purpose of reorganization is economy. . . . The reason for reorganization is good management." Berg, *Lapse of Reorganization Authority*, 35 PUB. AD. REV. 195, 197 (1975).

320. See, e.g., R. POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT* (1966).

321. ILL. CONST. art. IV, § 1.

322. See text accompanying notes 178 through 190 *supra*. See also Mansfield, *Federal Executive Reorganization: Thirty Years of Experience*, 29 PUB. AD. REV. 332, 336 (1969).

323. As Judge Charles Breitel has astutely observed:

A salient fact in the historical development of the law making process has been the decline in prestige of the legislative branch. . . . [T]he historical and political fact is that the practical control of legislation is largely in the hands of the Executive, and . . . when it is important enough it is the Executive that initiates the legislative process and it is the legislature that vetoes by refusing to approve.

Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 759-60 (1965).

324. See, e.g., *Walker v. State Board of Elections*, 65 Ill. 2d 543, 359 N.E.2d 113 (1976); *King v. Lindberg*, 63 Ill. 2d 159, 345 N.E.2d 474 (1976) discussed in the text accompanying notes 300 through 304 *supra*. During the 80th General Assembly, governmental reorganization was seized upon as a substantive area. Both houses of the General Assembly formed committees on reorganization and the House committee was the origin of the two bills (House Bills Nos. 2397 and 2398) signed as Pub. Acts 80-56 and 80-57 (1977) to ensure that Exec. Order No. 1977-1 and Exec. Order 1977-2 would become effective. Additionally, reorganization

the standpoint of the executive it may also be seized upon by the General Assembly as an issue for direct legislative action not a part of the article V, section eleven process.<sup>325</sup> Curative legislation was required to effect the first article V, section eleven reorganization once the General Assembly seized upon reorganization as an issue.

Through more novel concepts such as sunset legislation<sup>326</sup> or continuing strict legislative oversight<sup>327</sup> of all agency activity, the legislature may be making bolder long-range reorganization initiatives through the imposition of ongoing statutory processes than the executive could ever initiate and effect through the executive order device.

---

proposals were introduced by the House committee as committee bills. See House Bill No. 2401 which would create a State Department of Energy. In Senate Bill No. 1142, the General Assembly enacted at its own initiative significant reorganization legislation creating the Department of Mines and Energy. See text accompanying notes 276 through 286 *supra*.

325. See, e.g., Senate Bill No. 1142; House Bill No. 2397; House Bill No. 2378; House Bill No. 2401, 80th Illinois General Assembly (1977). See note 324 *supra*.

326. Under what is commonly known as "sunset" legislation, the existence of specified agencies or programs automatically terminates at the end of a specified period (e.g., every 6 or 10 years). Review of each agency by the legislature and full reenactment of authorization for recreation of any agency or program would be required. Sunset legislation was first adopted by Colorado in 1976 (COLO. REV. STAT. § 24-34-104 (Supp. 1976)). For an initial report of action under the Colorado statute, see Wall St. J. (Midwest Edition), August 24, 1977 at 30, col. 1. Since adoption of the Colorado statute, 22 states have adopted sunset legislation in some form. See, e.g., Georgia (Senate Bill of 1977); Arkansas (Act 100 of 1977) and Florida (FLA. STAT. ANN. ch. 77-457 (West Supp. 1977)). See generally Adams, *Sunset: A Proposal for Accountable Government*, 28 AD. L. REV. 511 (1976); Shimberg, *The Sunset Approach—The Key to Regulatory Reform*, 49 STATE GOV'T 140 (1976). The degree to which the legislature may "reorganize" under such a statute by failing to reinstate and extend an agency or creating an agency with new and differing powers and functions to replace an expiring agency is substantial. During the 80th Session of the Illinois General Assembly, four different sunset bills, some more or less felicitously described, were passed by the House of Representatives. See House Bill No. 185 (Regulatory Agency Self-Destruct Act); House Bill No. 1702 (Illinois Sunset Act of 1977); and House Bill No. 2231 (Illinois Regulatory Agencies Sunset Act). Despite House passage, all of these bills were pending without further action before the Senate Executive Committee when the session ended. On the Senate side, no action was taken on Senate Bill No. 1044 (Illinois Agency Planning Act) requiring five year agency plans of action for certain agencies. See also S. 600, 95th Cong., 1st Sess., 123 Cong. Rec. S2129 (daily ed. Feb. 3, 1977), proposing a federal sunset statute.

327. See generally Newman & Keaton, *Congress and the Faithful Execution of Laus—Should Legislators Supervise Administrators?*, 41 CAL. L. REV. 565 (1953); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV L. REV. 569 (1953); Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415 (1976); Rodino, *Congressional Review of Executive Action*, 5 SETON HALL L. REV. 489 (1974). In the 80th Illinois General Assembly, two bills were proposed which would amend the Administrative Procedure Act (ILL. REV. STAT. ch. 127, §§ 1001-1021 (1975)) to provide that all agency rules would be subject to a joint resolution of disapproval within 30 legislative days. Senate Bill No. 224, Senate Bill No. 412, 80th Illinois General Assembly (1977). Neither bill was acted upon during the session.