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Richard E. Favoriti

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EXECUTIVE POWER UNDER THE  
NEW ILLINOIS CONSTITUTION:  
*FIELD REVISITED*

by RICHARD E. FAVORITI\*

INTRODUCTION

The question of a governor's authority to issue executive orders that have the force and effect of law is of more than academic interest. On August 20, 1973 Illinois Governor Daniel Walker issued Executive Order No. 5 pertaining to the disclosure of political contributions by certain entities.<sup>1</sup>

The executive order required two types of business entities, "suppliers" of certain state agencies and "regulated businesses," to file statements of political contributions with the Department of Finance. The order had a retroactive effect in that the initial disclosure statement was required to reveal certain political contributions made during the preceding twenty-four months. After this initial filing, individuals or entities that become or continue to be either a "supplier" or a "regulated business" were required to file disclosure statements on a semi-annual basis in order to update their respective lists of contributions.

The disclosure mandated by the order pertained to all contributions to: (1) any candidate for state public office; (2) any elected official holding state public office; and (3) any organization, committee, fund, party or other entity which gave anything of value to a candidate for state public office. In addition, not only were the political contributions of a "supplier" and/or a "regulated business" required to be disclosed, but Executive Order No. 5 also required disclosure of political contributions made by certain defined "key persons."

Opposition to Executive Order No. 5 was immediate. Shortly after its issuance, a complaint was filed in the Circuit Court of Cook County, Illinois, Chancery Division, seeking, *inter alia*, to restrain the enforcement of this order. On September 21, 1973, after reading the briefs and hearing oral argument, the court ruled that the scope of Executive Order No. 5 exceeded the

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\* J.D., Northwestern University School of Law; B.S.C., DePaul University. Associate with the firm of Burditt & Calkins. Chairman of the Community Education Committee for Young Lawyers' Section of the Chicago Bar Association.

<sup>1</sup>The full text of Executive Order No. 5 is set out in the Appendix following this article.

authority of the governor and ordered the issuance of a temporary injunction. Further court action on this matter is anticipated.

This discussion will scrutinize a number of theories upon which the authority of a governor to issue executive orders is said to be founded.

#### THE EXECUTIVE ORDER AS A MANAGERIAL TOOL

It is generally recognized that the power to direct government officials is one of the most potent managerial powers that a governor may utilize. Although this power has not been clearly defined, it is generally agreed that a gubernatorial executive order can be an acceptable tool in implementing this power. A lack of uniformity among the states with respect to their constitutions, statutes, executive practices and court decisions prohibits treating the subject of executive orders as a uniform, unvarying form of governmental action. Nevertheless, three general classifications of executive orders may be defined: (1) ceremonial proclamations, (2) gubernatorial enactments, and (3) administrative orders.

Ceremonial proclamations are the most familiar type of gubernatorial executive order. This recognition is primarily attributed to the newsworthiness normally attached to the subject matters of such orders. Generally, the orders are formal in nature in that they are frequently issued over the signature of the governor, characteristically embossed with the seal of the state and invariably published or pronounced to the community at large. Gubernatorial proclamations establishing special observance days are forms of this type of order.<sup>2</sup>

Occasionally, a governor may issue an executive order which not only affects the community at large, but which also has the force of law. One possible basis for the issuance of such an order is a governor's statutory authority to promulgate regulations. An example of this use of executive order authority can be found within the Illinois Civil Defense Act, which enabled the governor to make or rescind any rules and regulations necessary to carry out the provisions of that Act.<sup>3</sup>

In addition to the use of executive orders for the purpose of ceremonial proclamations and gubernatorial enactments, the governor may issue an order affecting the administrative direction and/or control of state activities. Although few governors possess the untempered power to control all activities within

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<sup>2</sup> ILL. REV. STAT. ch. 6, § 16 (1971) (Citizenship Day); ILL. REV. STAT. ch. 126½, § 45.1 (1971) (Gold Star Mothers Day); ILL. REV. STAT. ch. 23, § 3366 (1971) (White Cane Safety Day); ILL. REV. STAT. ch. 46, § 22-7 (1971) (announcing election results).

<sup>3</sup> ILL. REV. STAT. ch. 127, § 274(c) (1) (1971).

their states, it is generally recognized that if the authority of a governor to direct and supervise is to be effective, it is imperative that he possess a certain measure of control over many areas of state activity. A common use of this type of order involves the day to day relationships existing between the governor and the officers serving in the executive department. For example, the governor of Iowa issued an executive order to "All State Departments" requesting that all state department automobiles stationed and operated in the Des Moines area be "inspected."<sup>4</sup>

Although the form and style of an executive order is largely dependent upon the personal judgment of its author, certain factors are usually taken into consideration in drafting an order: (1) the subject matter of the order, (2) the person to whom the order is directed, (3) the result sought to be achieved by the order, (4) the implications to be conveyed regarding the consequences of noncompliance with the order, and (5) the legal foundation for the issuance of the order.<sup>5</sup>

An executive order based on these considerations may take the form of a "request" to subordinate officials. For example, Governor Romney of Michigan, in issuing a directive concerning departmental reports, employed such mild phraseology as "it is desired," "each agency head is requested to," and "please submit a report." The directive concluded by stating that: "Your cooperation in making this an effective reporting system will be appreciated very much."<sup>6</sup> In contrast, a departmental communication issued by Governor Romney's predecessor, Governor Swainson, carried an implication of penalty for noncompliance. Governor Swainson's order "directed" all state agencies to comply with a list of requirements designed to implement the provisions of the State Civil Defense Act.<sup>7</sup>

It is arguable that the binding quality of an order and its implications of penalty for noncompliance are stronger in orders phrased as a mandate than in orders phrased as a request. The choice of what language to use is likely to emanate from the governor's relationship to the recipients of the order, his determination of the importance of the order's subject matter, and the diligence with which he seeks to achieve the desired results.

Although the factors discussed above are germane to the

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<sup>4</sup> State of Iowa Executive Order No. 5, April 11, 1961.

<sup>5</sup> NOTE, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 IOWA L. REV. 78, 84 (1964).

<sup>6</sup> State of Michigan, General Departmental Communication No. 1, January 16, 1963. See also, State of Michigan, General Departmental Communication No. 5, September 20, 1962.

<sup>7</sup> State of Michigan, General Departmental Communication No. 2, February 17, 1961.

treatment of the subject of executive orders, the most prominent consideration with respect to the use of this managerial tool is the legal basis for its issuance.

A governor's power to issue an executive order may find its genesis in any one of four sources: (1) broad grants of power emanating from general constitutional provisions; (2) specific grants of power based upon explicit and defined constitutional provisions; (3) general grants of power derived from broad statutory authority; and (4) specific grants of power resulting from individual legislative enactments.

#### BROAD GRANTS FROM GENERAL CONSTITUTIONAL PROVISIONS

A majority of the fifty state constitutions employ language which vests the "supreme executive power,"<sup>8</sup> the "chief executive power,"<sup>9</sup> or the "executive power"<sup>10</sup> in the office of the governor. Similarly, most of the state constitutions clothe the governor with the responsibility to "take care that the laws [of the state] are faithfully executed."<sup>11</sup> It has been contended that such provisions afford the governor general constitutional authority to issue executive orders. However, a review of the various jurisdictions construing these provisions discloses a lack of uniformity in determining their effect.

One of the earliest considerations given to the nature and extent of the powers of the chief executive was the 1839 Illinois case of *Field v. People ex rel. McClermand*.<sup>12</sup> The central question in the *Field* case revolved around the existence of the governor's power, by virtue of the general language of the state constitution, to remove the secretary of state from office and appoint a successor at will.

Two arguments were advanced in *Field* in support of the governor's power. The first was based upon five sections of the Illinois Constitution of 1818:

The powers of the government of the state of Illinois shall be divided into three distinct departments; and each of them be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive to another; and those which are judiciary, to another.<sup>13</sup>

No person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.<sup>14</sup>

<sup>8</sup> *E.g.*, ILL. CONST. art. V, § 8; CAL. CONST. art. V, § 1.

<sup>9</sup> *E.g.*, VA. CONST. art. V, § 69.

<sup>10</sup> *E.g.*, IND. CONST. art. V, § 1.

<sup>11</sup> *E.g.*, ALA. CONST. art. V, § 120; MINN. CONST. art. V, § 4; CAL. CONST. art. V, § 7.

<sup>12</sup> 3 Ill. (2 Scammon) 79 (1839).

<sup>13</sup> ILL. CONST. art. I, § 1 (1818).

<sup>14</sup> *Id.* art. I, § 2.

The executive power of the state shall be vested in a governor.<sup>15</sup>

He [the governor] may require information in writing from the officers in the executive department, upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed.<sup>16</sup>

The governor shall nominate and (by and with the advice and consent of the senate) appoint a secretary of state, who shall keep a fair register of the official acts of the governor, and when required, shall lay the same and all papers, minutes and vouchers relative thereto, before either branch of the general assembly, and shall perform such other duties as shall be assigned him by law.<sup>17</sup>

The initial inquiry which the argument demanded was a determination of whether the power claimed by the governor could be implied from the foregoing provisions of the Constitution of 1818. The court recognized that powers, other than those expressly granted, may be and often are, conferred by implication, and that under every constitution, the doctrine of implication must be resorted to in order to carry out the general grants of power.<sup>18</sup> The court amplified this general premise by stating that because of the very nature of the instrument, a constitution cannot enter into a minute specification of all the minor powers naturally and obviously included in and flowing from the great and important powers which are expressly granted.<sup>19</sup> Moreover, the court noted that as a general rule, when a constitution grants a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other.<sup>20</sup>

Speaking for the majority of the court, Mr. Justice Wilson stated that the first two constitutional provisions, article I sections 1 and 2, represented the declaration of a fundamental principle, and that although one of vital importance, it was to be understood in a limited and qualified sense. He continued by saying that:

It does not mean that the legislative, executive, and judicial power should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is, that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many. That this is the sense in which this maxim was understood by the authors of our government, and those of the general and state governments, is evidenced by the constitutions of all. In every one, there is a theoretical or practical

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<sup>15</sup> *Id.* art. III, § 1.

<sup>16</sup> *Id.* art. III, § 7.

<sup>17</sup> *Id.* art. III, § 20.

<sup>18</sup> *Field v. People ex rel. McClermand*, 3 Ill. (2 Scammon) 79, 83 (1839).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

recognition of this maxim, and at the same time a blending and admixture of different powers. This admixture in practice, so far as to give each department a constitutional control over the other, is considered, by the wisest statesmen, as essential in a free government, as a separation. This clause, then, is the broad theoretical line of demarcation, between the three great departments of government. But we are not therefore, when a question arises as to the extent of the powers of either, to confine our views to this general clause, which confers no specific powers. We should look to the division as actually made, to see what powers are clearly granted; for such only can be exercised. As no power, then, is granted to the governor by these sections, it necessarily follows that none can be implied.<sup>21</sup>

With respect to the clause vesting the executive power in the governor, article III section 1, the court noted that this provision conferred no specific power, and that like the above two provisions, it represented the declaration of a general rule. Quoting from a decision rendered by the United States Supreme Court, the court said, "that the general principles contained in the constitution, are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory . . . ."<sup>22</sup> The court then considered the remaining two constitutional provisions, article III sections 7 and 20, and found no legal foundation upon which the governor's attempted removal of the secretary of state could stand.<sup>23</sup>

The governor's second argument recognized that the power of removal was an executive function belonging to the governor, and contended that the power of removal was a necessary incident to the power of appointment. After some discussion, the court negated both theories and held that the governor had no power to remove the secretary of state at will.<sup>24</sup>

Other states have wrestled with the constitutionality of exercising executive power. In *Martin v. Chandler*,<sup>25</sup> the Kentucky Court of Appeals upheld a complaint challenging gubernatorial authority to issue an executive order which transferred the funds, personnel and functions of a division of the Department of Education to the Department of Finance. In entering an order directing the issuance of a permanent injunction, the reviewing court determined that an alleged specific statutory provision was inapplicable as a basis for issuing the executive order, in that the facts did not warrant the use of that statute as authority. After failing to find any constitutional authority for the issuance of the executive order in question, the court went on to say that

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<sup>21</sup> *Id.* at 83-84.

<sup>22</sup> *Id.* at 84.

<sup>23</sup> *Id.* at 108-09.

<sup>24</sup> *Id.* at 123.

<sup>25</sup> 318 S.W.2d (1958).

the "governor has only such powers as are vested in him by the Constitution and the statutes enacted pursuant thereto . . . [b]asically his power is to execute the laws, not to create laws."<sup>26</sup>

Courts in other states have taken a position contrary to that expressed in the *Field* and *Martin* cases. These courts have found that constitutional provisions vesting "the chief executive power of the state" in the governor and delegating to him the responsibility of "taking care that the laws of the state are faithfully executed" import general grants of power from which other powers may be implied. One of the strongest judicial pronouncements supporting this view is the Indiana case of *Tucker v. State*.<sup>27</sup>

In 1940 a single political party gained control of the Indiana legislature and every office except that of governor. By means of legislative enactments, the party in control sought to reorganize the executive branch in such a way as to severely limit the governor's power to appoint and in other ways leave him virtually powerless. After a gubernatorial veto of this legislation had been overridden, the governor caused the attorney general to initiate a lawsuit testing the constitutionality of the reorganization acts.

From the entry of an order directing the issuance of a temporary injunction restraining the enforcement of the acts, the defendants appealed. In affirming the lower court judgment, the Indiana Supreme Court ruled that the reorganization statutes were unconstitutional and that the executive power vested in the governor carried with it the general power to appoint.<sup>28</sup> In an attempt to promote what has come to be known as the "strong governor" concept, dicta continued to rationalize the court's sweeping action. The defendants argued that if the provision, "The executive power of the State shall be vested in a Governor,"<sup>29</sup> is construed as a grant of all executive power to the governor, the special grants thereafter itemized were unnecessary surplusage and, therefore, the provision should have been limited to the powers expressly conferred by specific mention.<sup>30</sup> The court rejected the argument by stating:

But if the executive powers granted to the governor are confined to expressed grants, the provision that the executive power shall vest in the governor is surplusage, and this cannot be. An examination of the provisions referred to as granting express executive power to the governor discloses that they are not, in fact, grants of power, but rather directions or mandates as to the manner in which executive power is to be exercised, or limitations

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<sup>26</sup> *Id.* at 44.

<sup>27</sup> 218 Ind. 614, 35 N.E.2d 270 (1941).

<sup>28</sup> *Id.* at 652, 35 N.E.2d at 284.

<sup>29</sup> IND. CONST. art. V, § 1.

<sup>30</sup> 218 Ind. 614, 654, 35 N.E.2d 270, 285 (1941).



upon power or delegation of power which is not in essence executive.<sup>31</sup>

It is apparent from the foregoing discussion that the inexact language of a constitution purporting to define executive power may permit either a limited construction, such as that given in the *Field* decision, or a broad construction, such as that given in the *Tucker* case. This kind of pliable phraseology appears in the Illinois Constitution of 1970 and may afford Illinois courts an opportunity to modify *Field*, though it would require a significant alteration if not an overruling of *Field*, to do so.

Article II of section 1 of the new constitution provides, "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." In addition, article V section 8 further provides that "The Governor shall have the *supreme executive power*, and shall be responsible for the *faithful execution of the laws*."<sup>32</sup>

It is doubtful that the governor could successfully contend that his power to issue Executive Order No. 5 is implied from the express terms of article II section 1. Basically, this section does not expressly grant any powers, but rather reiterates the separation of powers doctrine which is fundamental to our system of government. Furthermore, it was the intent of the drafters of the new constitution to leave this provision unchanged during the course of constitutional revision. In presenting the separation of powers article to the convention, Delegate Davis commented as follows:

We do not intend in any way to change the purport of the article. We recognize that probably there is no read [sic] need to have an article on the separation or distribution of powers. However, this is such an essential and traditional part of our form of government, and it is a part of nearly every constitution of this country. We therefore felt that it would be appropriate — and as a traditionalist I feel it is almost essential — to have an expression of the basic principle upon which our government works.<sup>33</sup>

Nor should the governor be permitted to imply the necessary power to issue Executive Order No. 5 from the provisions of article V section 8. Arguably, the terms of this provision are merely declaratory in nature and serve to grant no express powers. The 1839 decision rendered by the Illinois Supreme Court in the *Field* case demonstrates a narrow construction of executive power. Although the issue of executive orders and the power of a governor to issue them is in dispute throughout the states, the Illinois Supreme Court has not chosen to restrict or abandon the

<sup>31</sup> *Id.* at 656-57, 35 N.E.2d at 286.

<sup>32</sup> ILL. CONST. art. V, § 8 (emphasis added).

<sup>33</sup> REC. OF PROC., SIXTH ILL. CONST. CONV., *Verbatim Transcripts*, Vol. II at 1067 (1969-70). [hereinafter cited as *Verbatim Transcripts*].

reasoning behind the *Field* decision. Thus, the point that the doctrine of implication cannot be used unless there is a grant of an express power is still valid in Illinois today. Therefore, by virtue of the *Field* opinion, the governor should not be permitted to imply from the imprecise language of article V section 8 the power to issue an order as far reaching as Executive Order No. 5.

Article II section 2 of the 1970 Illinois Constitution is a new provision which states, "The enumeration in this Constitution of specified powers and functions shall not be construed as a limitation of powers of state government." The *Constitutional Commentary* to the annotated statutes indicates that:

Section 2 was probably intended, in part, to supersede the case of *Field v. People ex rel. McClernand*, 3 Ill. 79 (1839), which held that a constitution is a limitation on the power of the legislative branch of government, but a grant of powers (with the attendant problems of strict construction) to the executive and judicial branches.<sup>34</sup>

However, it would appear that this provision does not limit or supersede that part of the *Field* decision pertaining to general declaratory sections of the Illinois Constitution and the inability to imply powers therefrom. Article V section 8 generally declares that "The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws." The application of article II section 2, by its own language, is limited to the "enumeration . . . of specified powers and functions." It would be difficult to contend that article V section 8 "enumerates" any "specified powers" or "specific functions." If the terms of article II section 2 leave the language of article V section 8 unaffected, then the position adopted in the *Field* decision — that if no power is granted to the governor, none can be implied — also remains unchanged.

Another executive order issued by Governor Walker, Executive Order No. 4 dealing with financial disclosure requirements for employees under the governor's jurisdiction, has also been challenged in the courts. In a recent trial court decision<sup>35</sup> the court placed principal reliance upon article XIII section 2<sup>36</sup> of the 1970 Constitution in upholding the governor's power to impose such disclosure requirements. By way of dicta, how-

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<sup>34</sup> R. Helman & W. Whalen, *Constitutional Commentary*, 48, S.H.A., art. II, § 2.

<sup>35</sup> The decision was rendered in an opinion letter filed by Judge Ackerman of the Seventh Judicial Circuit in an action consolidating three cases: *Illinois State Employees Ass'n v. Walker*, No. 365-73; *Illinois Ass'n of Highway Engineers v. Walker*, No. 366-73; and *Troopers Lodge # 41, Fraternal Order of Police v. Walker*, No. 379-73. The plaintiffs sought a declaration that Executive Order No. 4, issued by Governor Walker on February 26, 1973, was illegal, unconstitutional, and unenforceable against plaintiffs and persons similarly situated in state government.

<sup>36</sup> See page 244 *infra*.

ever, the court indicated that the governor's principal power is derived from the general language of article V section 8. The court found that the latter part of that provision clearly required the governor to insure that state employees under his control were properly performing the duties assigned to them. It is certain that the decision will be appealed, but it is not known what attention, if any, the Illinois Appellate Court will devote to article V section 8. The appeal will present an opportunity for the appellate court to modify the *Field* opinion by declaring that article V section 8 is a grant of express power and not just a general declaratory provision. If such a result is brought about, further credence will be added to the implied ability of the governor to issue an executive order. But that ability arguably should be restricted to only those departments and persons under the direction and control of the chief executive.

#### SPECIFIC GRANTS FROM EXPLICIT CONSTITUTIONAL PROVISIONS

Although specific constitutional provisions upon which gubernatorial executive orders can be based are somewhat rare, the Illinois Constitution of 1970 contains two provisions which arguably may include specific powers from which other powers might be implied. Article V section 11 is new and authorizes the governor, by executive order, to reassign functions and to organize executive agencies which are directly responsible to him. If the executive order contravenes a statute, the General Assembly still has the power, by a majority of either house, to disapprove the executive order. Although this section is of no apparent significance to the problem at hand, the committee report on this matter to the Constitutional Convention of 1970 is noteworthy. The comments of Executive Article Committee Chairman Tecson indicate an intent to limit the governor's power in this regard to those persons who are directly responsible to him:

It's a device which is new to the state of Illinois. It's present in other states in their constitutions, and the purpose of this section is to give authority to the governor to reorganize agencies which are directly responsible to him. It in no way touches upon or impinges upon the authority of other elected officers. It in no way touches upon or impinges upon quasi-judicial or quasi-legislative boards — for example, the Commerce Commission, or the Industrial Commission. It is designed mostly to assist the governor in his duty as chief executive, to help realign functions, mostly in his Code Departments. It is not intended to create any authority or to remove any authority.<sup>37</sup>

Chairman Tecson's remarks also should be kept in mind when considering the novel quality of article XIII section 2:

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<sup>37</sup> *Verbatim Transcripts*, vol. III at 1327.

All candidates for or holders of state offices and all members of a Commission or Board created by this Constitution shall file a verified statement of their economic interests, as provided by law. The General Assembly by law may impose a similar requirement upon candidates for, or holders of, offices in units of local government and school districts. Statements shall be filed annually with the Secretary of State and shall be available for inspection by the public. The General Assembly by law shall prescribe a reasonable time for filing the statement. Failure to file a statement within the time prescribed shall result in ineligibility for, or forfeiture of, office. This Section shall not be construed as limiting the authority of any branch of government to establish and enforce ethical standards for that branch.<sup>38</sup>

It can be contended that this section of the constitution not only endorses the disclosure of economic interests, but also encourages those in positions of governmental responsibility to take action in the field of ethics. In view of the specific indication that "any branch" shall not be limited in its enforcement of ethical standards, it is clear that the executive branch falls within this grant. However, the proceedings of the 1970 Constitutional Convention further support the conclusion that, with respect to the governor, the implied power derived from this provision is restricted to those persons and agencies which come within the control and rule of the governor:

[I] think that we have to depend on the governor to set up his own methods of control of his directors, who are under his immediate supervision.

The elected officers . . . are only under the supervision of the people. The governor can't enforce a standard of conduct with them. In his own directed departments he's got the responsibility and duty of doing it.<sup>39</sup>

It therefore appears that while the framers of the 1970 Constitution responded to the need for an ethics section by drafting an explicit constitutional provision, this grant of power was not without limitation.

The limitation contemplated by the drafters finds further support in the traditional separation of powers doctrine. Each of the prior constitutions under which Illinois has been governed has contained an express provision dividing and distributing the powers of government and prohibiting one department from exercising the powers belonging to another.<sup>40</sup> The 1970 Illinois Constitution is no exception.<sup>41</sup> The purpose behind such a provision is founded upon the scheme of checks and balances designed to keep each department within its own sphere. In actu-

<sup>38</sup> ILL. CONST. art. XIII, § 2.

<sup>39</sup> *Verbatim Transcripts*, vol. III at 1753 (remarks of Delegate Canfield).

<sup>40</sup> ILL. CONST. art. I, §§ 1, 2 (1818); ILL. CONST. art. II, §§ 1, 2 (1848); ILL. CONST. art. III (1870).

<sup>41</sup> ILL. CONST. art. II, § 1.

ality the separation of powers doctrine does not operate with the precision of the theory; for the three coordinate branches of the government are not completely independent of each other. Accomplishing the legitimate purposes of government often requires that the three branches act in concert, and it is not uncommon for one branch to permit powers, which in strict legal theory fall within its own realm, to be exercised by a coordinate branch. However, when a case does arise involving an alleged *appropriation* of power, a literal interpretation of the separation of powers provision is more readily justified.<sup>42</sup>

Thus, if Executive Order No. 5 is to be justified by the specific constitutional grant of power contained in the ethics section of the new constitution, it must not transgress the limitations intended by the framers nor the restrictions imposed by the separation of powers provision. To determine whether or not Executive Order No. 5 is such a transgression, the scope of the order must be examined.

The executive order imposes disclosure requirements on "suppliers" entering into purchase transactions with a "State Agency." In his order the governor defines "State Agency" as: any executive department, commission, board or agency whose vouchers are subject to approval by the department of Finance; any board, commission, agency or authority which has a majority of its members appointed by the Governor; and the Governor's Office.<sup>43</sup>

From this definition it is arguable that the order pertains not only to any executive department, but also to any commission, board or agency of the legislative or judicial departments whose vouchers are subject to approval by the Department of Finance. The vouchers of many governmental agencies, such as those of the Legislative Reference Bureau, must be processed and approved by the Department of Finance. In accordance with the definition contained in the executive order, the Legislative Reference Bureau would be considered a "State Agency" and would be included within the terms of the order. But it is uncontested that the Bureau is the purest of *legislative* agencies and therefore cannot fall within the executive department's sphere of control. Hence, by extending his power to the legislative branch, it appears that the governor has overreached whatever implied power the framers of the constitution intended that he receive by virtue of the ethics section of the new constitution, article XIII section 2. To the degree that Executive Order No. 5 attempts to address itself to the departments, boards, commissions and

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<sup>42</sup> See *People ex rel. Elliot v. Covelli*, 415 Ill. 79, 112 N.E.2d 156 (1953); *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N.E.2d 713 (1952).

<sup>43</sup> See appendix.

agencies of either the legislative or judicial branches of government, it is invalid.

#### GENERAL GRANTS FROM BROAD STATUTORY AUTHORITY

There are a number of states whose legislatures have enacted statutes granting powers to their governor,<sup>44</sup> separate and apart from those powers delegated to him by virtue of their respective state constitutions. However, it does not appear that there is much general statutory basis which permits the promulgation of gubernatorial executive orders in the state of Illinois. Examples of what little statutory power there is can be found in the Emergency Powers of the Governor<sup>45</sup> and in the Militia Powers.<sup>46</sup> The only statutory provision that dealt with the question of disclosure and at all approached the problem at hand was a statement pertaining to the promulgation of codes of conduct under the Ethics Act:

The Governor and each elected State officer in the Executive Department shall promulgate detailed codes of conduct for appointed officers and employees under their respective jurisdictions.<sup>47</sup>

However, this provision was repealed one year ago.<sup>48</sup>

The absence of broad statutory authority granting general powers to the governor of Illinois was commented upon by Judge Ackerman in his decision upholding Executive Order No. 4.<sup>49</sup> The opinion indicates that in some areas it is possible that this lack of statutory authority is a further reflection of the inherent power implicit within the constitutional provisions pertaining to the governor. Thus, in Illinois there exist few general grants of gubernatorial power from broad statutory authority.

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<sup>44</sup> For example, Iowa's Budget and Financial Control Act states:

The governor of the state shall have:

1. Direct and effective financial supervision over all departments and establishments, and every state agency by whatever name now or hereinafter called, including the same power and supervision over such private corporations, persons and organizations that may receive, pursuant to statute, any funds, either appropriated by, or collected for, the state, or any of its departments, boards, commissions, institutions, divisions and agencies.

2. The efficient and economical administration of all departments and establishments of the government.

IOWA CODE ANN. §§ 8.3 (1), (2) (1967).

A state legislature may further underscore the general constitutional powers of the governor by using broad statutory language to describe his authority. For example, the Maryland Code provides:

The head of the Executive Department shall be the Governor of the State, who in addition to the rights, powers, duties, obligations, and functions now or hereafter conferred by law, shall also have supervision and direction over the officers and agencies hereby or hereafter assigned to the Executive Department.

ANN. CODE OF MD. art XLI, § 15 (1957).

<sup>45</sup> ILL. REV. STAT. ch. 123, § 7 (1971).

<sup>46</sup> ILL. REV. STAT. ch. 129, § 220.03 (1971).

<sup>47</sup> ILL. REV. STAT. ch. 127, § 605-101 (1971).

<sup>48</sup> P.A. 77-1806, art. 8, § 2, effective Jan. 24, 1972.

<sup>49</sup> See note 35 *supra* and accompanying text.

## SPECIFIC GRANTS FROM INDIVIDUAL LEGISLATIVE ENACTMENTS

Specific statutory provisions which authorize the issuance of gubernatorial executive orders are not common. However, it is generally recognized that the chief executive of the state could be given the power to issue orders for specific purposes, just as some powers may be specifically delegated to any public official. A review of the Illinois statutes in this regard reveals no enactment which specifically directs itself to the granting of executive order power to the governor. The only statutory provision indicating the possibility of executive order power within the gubernatorial office is one which provides a procedure for the numbering of executive orders issued by the governor and filing with the secretary of state.<sup>50</sup>

Thus, the obvious absence of either general or specific statutory authority for the issuance of gubernatorial executive orders evidences the legislature's reluctance to grant this type of power to the chief executive.

## CONCLUSION

Of the three general classifications of executive orders, it is clear that Executive Order No. 5 is a gubernatorial enactment, *i.e.*, one which affects the public at large, intended to have the force of law and serving to implement or supplement the constitution and laws of Illinois. Any gubernatorial justification for the issuance of Executive Order No. 5 must find its genesis in one of the four traditional legal bases discussed in this article.

If the order is to find sustenance in broad grants of power from general constitutional provisions, it must circumvent the barrier erected by the *Field* case. Since the Illinois Supreme Court has neither restricted nor abandoned the reasoning of *Field*, the language of article V section 8 should be considered general and declaratory from which no other powers may be implied. However, it is possible that the appeal of Judge Ackerman's recent decision will provide the Illinois Appellate Court with an opportunity to reconsider the *Field* case and declare article V section 8 of the new constitution to be a specification of powers from which other powers may be implied.

If Executive Order No. 5 lays claim to the ethics section of the new charter as a specific grant of constitutional power, it will meet resistance from the framers' expressed intention and the separation of powers provision. In order for article XIII section 2 to sanction the issuance of an executive order, the order must, by virtue of the separation of powers doctrine and the

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<sup>50</sup> ILL. REV. STAT. ch. 124, § 6a (1971).

manifest intent of the framers of the constitution, be limited in scope to only those agencies and personnel falling within the executive department. To the degree that any order attempts to address itself to the departments, boards, commissions and agencies of either the legislative or judicial branches of government, it is invalid. Nor will the order find support in general or specific statutory authority, for there is no such authority in this regard.

The issuance of Executive Order No. 5 has rekindled the controversy surrounding the exercise of power by the chief executive. The Illinois Constitution of 1970, especially the ethics section of article XIII, is likely to add fuel to the fire. The *Field* decision has confined the exercise of executive power for over a hundred years. Contemporary judicial action may continue to temper the flame ignited by this latest gubernatorial pronouncement.



## APPENDIX

## EXECUTIVE ORDER NO. 5

*Disclosure of Political Contributions*

For too long the relationship between political contributions and state business has been shrouded in secrecy. The public is entitled to the assurance that the state's decisions to buy or build are made on the proper basis of price, service and quality; that decisions in regard to regulated businesses are based on the public interest.

Suppliers to the state and businesses regulated by the state, together with their key officials, should not be precluded from participating in the political process through any proper means, including political contributions where the law so permits. But, it is time to make this financial participation a matter of public record. The certainty of public exposure will deter the making of contributions for improper purposes and assure people that government decisions are not made on the basis of political favoritism.

In today's climate, extraordinary steps are required to restore public confidence in government. It is appropriate that the powers of the Executive be used to the fullest extent possible to achieve this goal.

Accordingly, I hereby order:

1. For purposes of this Order:

- A. "State Agency" means any executive department, commission, board or agency whose vouchers are subject to approval by the Department of Finance; any board, commission, agency or authority which has a majority of its members appointed by the Governor; and the Governor's Office.
- B. "Purchase Transaction" means a purchase, or a contract to purchase, goods or services of any kind by a State agency.
- C. "Supplier" means any individual, firm, corporation, association, partnership, joint venture, sole proprietor or other business entity which is prequalified to enter, or which enters into, a "purchase transaction" with a State agency.
- D. "Regulated Business" means any individual, firm, corporation, association, partnership, joint venture, sole proprietor or other business entity regulated or licensed, or applying to be regulated or licensed, by the Department of Insurance, the Department of

Financial Institutions, the Department of Mines and Minerals (excepting individuals or business entities regulated only under Chapter 93, Sections 143-156 (which relates to explosives) and Chapter 104, Section 63.1 (which relates to water wells)), the Commissioner of Banks and Trust Companies, the Commissioner of Savings and Loan Associations, the Illinois Liquor Control Commission, the Illinois Racing Board or the Illinois Commerce Commission.

- E. "Key Person" means (i) any officer, director, partner, proprietor, managing agent or owner (legal or beneficial) of more than 7½ percent of any supplier or regulated business, (ii) any lobbyist representing such supplier or regulated business who is required to register under the Lobbyist Registration Act; and (iii) any other person or entity acting at the direction of any person referred to in subparagraph 1 (E) (i) — (ii).
- F. "Political Contribution" means any gifts of money, stocks, bonds, goods, property, commercial services or anything else of value to
- i) any candidate for State public office;
  - ii) any elected official holding State public office;
  - iii) any organization, committee, fund, party or other entity giving money, stocks, bonds, goods, property, commercial services or anything of value to or on behalf of any candidate for State public office.
- G. "State Public Office" means all the legislative and executive offices established under Articles IV and V of the Illinois Constitution.
2. Each individual or business entity which is or becomes a supplier or regulated business prior to September 15, 1973, shall, on or before September 15, 1973, file with the Department of Finance a Statement of Political Contributions and thereafter shall file such Statement as required by rules issued by the Department of Finance pursuant to this Order, but no less often than semi-annually. Each individual or business entity which becomes a supplier or regulated business on or after September 15, 1973, shall file a Statement of Political Contributions at, or immediately prior to, the time such individual or business entity becomes a supplier or regulated business and thereafter shall file such Statement as required by rules issued by the Department

of Finance pursuant to this Order, but no less often than semi-annually. No supplier shall be eligible to enter into a purchase transaction unless such Statement has been filed in accord with this Order and the rules issued by the Department of Finance pursuant thereto.

3. The Statement of Political Contributions shall be under oath and shall include the date, amount, donor, donee, and nature of every political contribution and the date, amount, lender, borrower, terms and extent of repayment of any loan (other than one made by a lending institution) to any individual or entity referred to in subparagraph 1 (F) (i) — (iii) of this Order made within the 24-month period prior to the date of filing of the Statement (i) by the supplier or regulated business directly or through any trade or industry association and (ii) by any key person of that supplier or regulated business; provided, however, that any Statement required to be filed on or before September 15, 1973, shall set forth the required information for the 24-month period prior to the effective date of this Order and for the period from the date of this Order through the date of filing.
4. The Department of Finance shall, from time to time, as may be necessary and appropriate, issue rules to implement and enforce this Order.
5. Each Statement of Political Contributions filed under this Order shall be open to reasonable public inspection in accord with rules issued by Department of Finance pursuant hereto as to the time, place and manner of inspection.
6. This Order is effective upon filing with the Secretary of State and shall remain in full force and effect unless amended or revoked by Executive action.