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81. Citizens Conference on State Legislatures, *The Sometime Governments: A Critical Study of the Fifty American State Legislatures* 251 (1971).
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85. Bruce Edward Cain, *Legislative Redistricting*, *supra* n. 67, 392–93.
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88. *See* Lani Guinier, *The Tyranny of the Majority* (1994).
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91. Va. Const., art. IV, § 2, § 3.
92. N. Dak. Const., art. IV, § 2.
93. Suzy Platt, ed., Respectfully quoted 198 (1963).
94. Jon C. Teaford, *The Rise of the States*, 13–14 (2002).
95. Citizens Conference on State Legislatures, *supra* n. 81, 156.
96. *Ibid.* 41, 56, 57–62, 103–04.
97. Teaford, *supra* n. 94, 200.
98. In eleven of these states the legislature may not determine the subjects considered at the special session. Council of State Governments, *supra* n. 32, 69–73.
99. In twelve of these states, a supermajority may vote to extend the length of the regular session. *Ibid.*
100. Robert Luce, *Legislative Assemblies* 181 (1924).
101. *Ibid.*, 181–87.
102. Citizens Conference on State Legislatures, *State Constitutional Provisions Affecting Legislatures* 26 (1967).
103. *Ibid.*
104. Robert F. Williams, "State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement," 48 *U. Pitt. L. Rev.* 797 (1987).
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106. See Robert Luce, *Legislative Procedure* 1–22 (1922); Gordon S. Wood, *The Creation of the American Republic* 226–37 (1969).
107. Pa. Const., I, § 10, § 13, § 14, § 16.
108. Hans J. Linde, “Due Process of Law Making,” 55 *Neb. L. Rev.* 197, 253 (1976).
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111. Pa. Const., art. III, § 3.
112. Millard H. Ruud, “No Law Shall Embrace More Than One Subject,” 42 *Minn. L. Rev.* 389 (1958).
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115. See Anthony G. Amsterdam, Note, “The Void for Vagueness Doctrine in the Supreme Court,” 109 *U. Pa. L. Rev.* 67 (1960).
116. Pa. Const., art. III, § 10.
117. Pa. Const., art. III, § 2.
118. Pa. Const., art. III, § 1; see Martha J. Dragich, “State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject and Clear Title Requirement,” 38 *Harv. J. on Legis.* 103, 111–13 (2001).
119. Pa. Const., art. III, § 4.
120. Pa. Const., art. III, § 4, § 5, § 8.
121. C. Dallas Sands, 1 *Sutherland on Statutory Construction* 611 (4th ed., 1985).
122. Williams *supra* n. 104.
123. For example, *Tuck v. Blackmon*, 798 So. 2d 402 (Miss., 2001) (refusing to enforce art. IV, § 59, Miss Const. requiring that any law or statute be read in full before final passage).
124. 1 C. Dallas Sands et al., *Local Government Law*, § 3.21 nn. 3–5 (1982).
125. Ala. Const., art. IV, § 106; Fla. Const., art. III, § 10; Pa. Const., art. III, § 7.
126. N.Y. Const., art. IX, § 2(b).
127. *Anderson v. Board of County Commissioners of Cloud County*, 77 Kan. 721, 95 P. 587 (1908).
128. Ala. Const., § 110.
129. Howard, *supra* n. 45, 549.

130. *See* Donald Marritz, “Making Equality Matter (again): The Prohibition Against Special Laws in the Pennsylvania Constitution,” 3 *Widener J. Pub. L.* 161 (1993); Robert F. Williams, “Equality Guarantees in State Constitutional Law,” 63 *Tex. L. Rev.* 1195 (1985).

131. Sands, *supra* n. 123, § 3.21.

132. For example, Kan. Const., art. II, § 17.

133. Ian Rosenthal, Burdett A. Loomis, John R. Hibbing, and Karl T. Kurtz, *Republic on Trial* 198–214 (2003).

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# Chapter Three

## The Executive Branch

Thad Beyle

The principle to guide the design of a state's executive branch was clearly stated by former North Carolina Governor, Terry Sanford, "Make the chief executive of the state the chief executive in fact."<sup>1</sup> He continued by arguing "the governor is responsible for leadership within each state. To be able to lead, the governor needs to be freed from the barbed wire of antiquated constitutional barriers. . . . (The governor) must have the tools he needs to lead effectively."<sup>2</sup>

### SOME HISTORICAL BACKGROUND

In September 1775, John Adams stood at his writing desk as a committee of one drafting the proposed new Constitution for the Commonwealth of Massachusetts. For resources, he fell back on his own earlier work, *Thoughts on Government*, and on the work of those in other states to develop "A Constitution or Form of Government for the Commonwealth of Massachusetts."<sup>3</sup> He proposed a separation of powers between the three separate departments of government—legislature, executive, and judicial. His work was accepted by the full convention with but a few notable changes and has been called "the oldest functioning written constitution in the world."<sup>4</sup>

But as in all the constitutions adopted in the original thirteen states there were three important trends in the powers provided to those separate departments. One was establishing a separate and independent judiciary. However, it is the second two trends that are of importance to this specific topic—the strength that was lodged in the new state legislatures and the lack of strength that was lodged in the governorships. The greater legislative strength was an obvious reaction to the lack of effective representation of the citizens under the imposed colonial governors, and the lesser gubernatorial strength was in reaction to the strength of those imposed colonial governors. Although the governor would "have veto power over the acts of the legislature," the new Constitution called for an annual election of the governor.<sup>5</sup> There were various restrictions on the governorship placed in other new state constitutions. In

North Carolina, one of the delegates to the 1776 North Carolina convention was asked how much power they had proposed to give the governor, to which he replied: "just enough to sign the receipt for his salary."<sup>6</sup>

So the history of the American state governorship is one of rather weak beginnings, followed over the next two centuries by a gradual and incremental movement to provide the governors with more powers. But with some of these incremental steps came other problems. For example, as more states transferred the selection of the governor from the legislature to the people, they often called for the direct election of other state administrative officials. This meant that governors found that they had to share the executive branch powers with other elected officials even though many felt that their vote for governor was a vote for the person who would run the state's executive branch.

The reforms toward the end of the nineteenth century and early twentieth century brought the concept of "neutral competence" into state and local governments. Responding to the excesses of patronage by some elected officials and corruption in several states and cities, a drive to raise the competence of those serving in state and local governments began. The key to these reforms was to install some form of merit system or civil service personnel procedures in these governments so that "what you know" would replace "who you know" as the key factor in securing and keeping jobs, and for promotions. The goal was to separate politics from government insofar as possible.

Similarly, as new responsibilities faced the states, the answer was often to establish agencies, boards, and commissions, often outside the reach of any elected executive branch official. Governors may have had the authority to appoint members of these boards and commissions, but they often shared that responsibility with the legislature either in appointing them or in having the legislature confirm their appointments. Again, the aim was to separate the politics of the past from the policy making and administration of the present and future. The effect of these reforms was to place restrictions on how much power the governor actually had over the various parts of the executive branch of government.

During the twentieth century, there were at least four waves of reform in the states that have had an impact on state executive branches. The first began in 1917 and focused on creating comprehensive plans of administrative organization. In Illinois the movement was led by Governor Frank O. Lowden and in New York by Governor Alfred E. Smith. This movement culminated in the publication of "A Model State Constitution" by the National Municipal League in 1921, which called for "a centralized plan of State organization, headed by the governor, a single-house legislature, and unified court structure."<sup>7</sup>

The second wave of reform came in the mid-1930s, as the appointment of a federal commission by President Franklin Roosevelt to reform the federal executive branch stimulated consideration of executive branch reorganization in the states. In the twenty-five years that these two waves of reform encom-

passed, it was estimated that “every state in the Union has at one time or another . . . considered the matter of administrative reorganization.”<sup>8</sup> Eleven of the states sought “to make the governor in fact, as well as in theory, the responsible chief executive of the state.”<sup>9</sup>

The third wave of state reform was again stimulated by presidential actions, as Presidents Harry Truman and Dwight Eisenhower established the “Hoover Commissions” to look at the possibilities of executive branch reorganization at the national level. These in turn stimulated states and even cities to establish “Little Hoover Commissions” to seek the same goals in their governments.<sup>10</sup> “Concentration of authority and responsibility,’ ‘functional integration,’ ‘direct lines of responsibility,’ ‘grouping of related services,’ ‘elimination of overlapping and duplication,’ and ‘need for coordination’ echoed through state capitols.”<sup>11</sup>

The fourth wave began in the mid-1960s as a number of developments illuminated the need to reform state governments. The U.S. Supreme Court’s decisions on equal education and the need for redistricting state legislatures brought ferment throughout the states. The “Great Society Programs” of the Lyndon Johnson presidency made clear to the states the need to get their houses in order so the programs could be carried out. And a series of state leaders such as former North Carolina Governor Terry Sanford and former California Speaker of the House Jess Unruh were given foundation grants to help the fifty states develop their roadmaps for reform.<sup>12</sup> By 1983, Larry Sabato argued, “Within the last twenty years, there has been a virtual explosion of reform in state government. In most of the states, as a result, the governor is now truly the master of his own house, not just the father figure.”<sup>13</sup>

In a sense, this fourth wave of reform continues to this day as states continue to make changes as new leadership is faced with problems that need to be alleviated. By 1992, major state executive branch reorganization efforts had taken place in twenty-seven states since the 1960s.<sup>14</sup> While there is a sense that the states are between waves now, it would not be too surprising to see some states begin undertaking major executive branch reorganization due to the fiscal problems they are facing at the beginning of the twenty-first century. The goals articulated in these reorganization efforts were “modernization and streamlining of the executive branch machinery, efficiency, economy, responsiveness, and gubernatorial control.”<sup>15</sup> Other reforms and changes affecting the state executive branches were also occurring.

## WHERE STATE EXECUTIVE BRANCHES STAND NOW

The first way to view what has been happening since the 1960s is to look at the “Index of Formal Powers of the Governorship” first developed by Joseph

Schlesinger,<sup>16</sup> which this author picked up and has continued to update.<sup>17</sup> The Index consists of six different indices of gubernatorial power as seen in 1960 and in 2003. These indices include the number and importance of separately elected executive branch officials, the tenure potential for governors, the appointment power of governors for administrative and board positions in the executive branch, the governor's budgetary power, the governor's veto power, and the governor's party strength in the state legislature. Each of the individual indices is set in a five-point scale with five being the most powerful and one being the least. (See the notes to table 1 for detail on how each of these indices and the overall Index was developed.)

TABLE 1  
Governors' Institutional Powers 1960 vs. 2002

<i>Specific Power</i>	<i>Scores</i>		<i>% Change</i>
	<i>1960</i>	<i>2002</i>	
SEP	2.3	2.9	+28
TP	3.2	4.1	+28
AP	2.9	3.1	+ 7
BP	3.6	3.1	-14
VP	2.8	4.5	+61
Totals	14.8	17.7	+20

NOTES:

SEP—Separately elected executive branch officials: 5 = only governor or governor/lieutenant governor team elected; 4.5 = governor or governor/lieutenant governor team, with one other elected official; 4 = governor/lieutenant governor team with some process officials (attorney general, secretary of state, treasurer, auditor) elected; 3 = governor/lieutenant governor team with process officials, and some major and minor policy officials elected; 2.5 = governor (no team) with six or fewer officials elected, but none are major policy officials; 2 = governor (no team) with six or fewer officials elected, including one major policy official; 1.5 = governor (no team) with six or fewer officials elected, but two are major policy officials; 1 = governor (no team) with seven or more process and several major policy officials elected. (*Source: The Book of the States, 1960–1961* [1960]: 124–25 and 2000–2001 [2000]: 33–38.)

TP—Tenure potential of governors: 5 = 4-year term, no restraint on reelection; 4.5 = 4-year term, only three terms permitted; 4 = 4-year term, only two terms permitted; 3 = 4-year term, no consecutive election permitted; 2 = 2-year term, no restraint on reelection; 1 = 2-year term, only two terms permitted. (*Source: Joseph A. Schlesinger, "The Politics of the Executive," in Politics in the American States, edited by Herbert Jacob and Kenneth N. Vines* [Boston: Little, Brown, 1965]: 229; and *The Book of the States, 2000–2001* [2000]: 31–32.)

AP—Governor's appointment powers in six major functional areas: corrections, K–12 education, health, highways/transportation, public utilities regulation, and welfare. The six individual office scores are totaled and then averaged and rounded to the nearest .5 for the state score. 5 = governor appoints, no other approval needed; 4 = governor appoints, a board, council or legislature approves; 3 = someone else appoints, governor approves or shares appointment; 2 = someone else appoints, governor and others approve; 1 = someone else appoints, no approval or confirmation needed. (*Source: Schlesinger* [1965]: 229; and *The Book of the States, 2000–2001* [2000]: 34–37.)



Table 1 (*continued*)

BP—Governor’s budget power: 5 = governor has full responsibility, legislature may not increase executive budget; 4 = governor has full responsibility, legislature can increase by special majority vote or subject to item veto; 3 = governor has full responsibility, legislature has unlimited power to change executive budget; 2 = governor shares responsibility, legislature has unlimited power to change executive budget; 1 = governor shares responsibility with other elected official, legislature has unlimited power to change executive budget. (*Source*: Schlesinger [1965]: 229; *The Book of the States*, 2000–2001 [2000]: 20–21; and NCSL, “Limits on Authority of Legislature to Change Budget” [1998].)

VP—Governor’s veto power: 5 = has item veto and a special majority vote of the legislature is needed to override a veto (three-fifths of legislators elected or two-thirds of legislators present); 4 = has item veto with a majority of the legislators elected needed to override; 3 = has item veto with only a majority of the legislators present needed to override; 2 = no item veto, with a special legislative majority needed to override it; 1 = no item veto, only a simple legislative majority needed to override. (*Source*: Schlesinger [1965]: 229; and *The Book of the States*, 2000–2001 [2000]: 101–103.)

Total—sum of the scores on the five individual indices. Score—total divided by five to keep 5-point scale.

Ambition Ladder for Statewide Elected Officials, 1990–2001

<i>Office</i>	<i>Total Races</i>	<i>Won</i>	<i>Lost</i>	<i>Average</i>
Lieutenant Governor	35	12	23	34%
Secretary of State	12	4	8	33%
State Treasurer	9	3	6	33%
Attorney General	29	4	25	14%
State Auditor	8	1	7	13%
Totals	93	24	69	26%

*Source*: [www.unc.edu-beyle](http://www.unc.edu-beyle).

Over the four decades involved in the comparison of 1960 and 2003 indices, the overall institutional powers of the governors in the fifty states increased by 12.5 percent. The greatest increase among the individual gubernatorial powers was in their veto power (+61%) as more governors gained an item veto. Further, in 1996 North Carolina voters were finally able to vote on a constitutional amendment giving their governor veto power. For over two centuries the North Carolina state legislature had refused to allow such an amendment to go to the voters as it would have curbed their power. And it was not until November 2002 that the gubernatorial veto was ever used in the state.

The indices measuring the tenure potential of the governor (length of term and ability to seek an additional term or terms), and the number of separately elected executive branch officials showed identical 28 percent increases in favor of the governor. The governor’s appointment power over six specific functional area executive branch officials did not increase very much (+7%).<sup>18</sup> In fact, there are still a considerable number of separately elected executive

branch officials in addition to the governors across the fifty states, so there is considerable room for reform in this area.

The gubernatorial budgetary power actually declined over the period (−14%). However, we must remember that during this same period state legislatures were also undergoing considerable reform and gaining more power and the ability to work with the governor's proposed budget was one of those reforms sought. Hence, while some states' governors may have seen increased budgetary powers, there were also increased legislative budgetary powers that may have more than balanced out the increases in gubernatorial powers.

Finally, there has been a drop in the gubernatorial party control in the state legislature over the period (−17%). Most of this change can be attributed to the major partisan shifts occurring in the Southern states over the period as the region has been moving from a one-party type of politics to a very competitive two-party type of politics.<sup>19</sup> In 1960, thirteen of the fourteen governors were Democrats, and all twenty-eight state legislative houses were under Democratic control. In 2003, the governorships were split evenly at seven each for Democrats and Republicans, while the Democrats held a seventeen to ten edge in control of the state legislative houses. The North Carolina House, while split evenly between the parties, is run by a coalition of mainly Democrats and a few Republicans—with a “dual speakership” running the House. However, the governors of Alabama, Arkansas, Louisiana, and Virginia face a legislature completely controlled by the opposite party, while the governors of Georgia and Kentucky face a legislature with split partisan control.

## WHAT REMAINS TO BE DONE?

To explore the remaining agenda for constitutional reform of the state executive branch, we will look at specific areas that recent events have pinpointed as areas needing attention. In some cases, specific states will be pinpointed as targets of such reforms.

### Gubernatorial Tenure

The goal of most states has been to follow the federal model of allowing the executive to serve a four-year term. There are now only two states, New Hampshire and Vermont, that restrict their governors to a two-year term. Recently, constitutional amendments in two other states changed the length of their gubernatorial terms from two years to four years so that the Arkansas governor elected in 1986 and the Rhode Island governor elected in 1994 initiated four-year terms in those states. The argument for a four-year versus a two-year term was succinctly stated by an incumbent governor at a “New Governors’ Seminar”

run by the National Governors' Association. In your first year, you learn how to become a governor; in the second and third years you are being the governor and getting the business of state done; in the fourth year, you are running for reelection. In a two-year term, those middle two years of being governor are missing.

The second aspect of the gubernatorial tenure question is whether a governor can seek reelection to another term. While eleven states have no limitation on how many terms a governor may serve, thirty-six do limit their governors to two successive terms, while Utah limits their governor to three terms. For some that is an absolute limit, for others it means a two-term governor must vacate the office but could return after someone else serves a term. In Nebraska and Washington governors are limited to serving only eight years in a fourteen- or sixteen-year period. Virginia alone remains as a state that only allows their governor to serve a single term with no consecutive election allowed. Hence, the minute a governor is elected in Virginia and sworn in, he or she is a "lame-duck" as everyone with an interest in the governorship begins to look around to see who might become the next governor.

The goals of reform in terms of gubernatorial tenure are very state specific: New Hampshire and Vermont should join the other forty-eight states in providing their governors with four-year terms, and Virginia should allow its governor a possibility of succession to a second term.

## Gubernatorial Elections

Another part of the gubernatorial tenure question concerns the timing of gubernatorial elections in relation to presidential elections. The concern here is the fear or possibility that events at the national and international level tied to the presidential election may prevent state-level candidates from articulating the issues and concerns that voters should be thinking about when voting for state officials. Further, a landslide victory for a presidential candidate can provide presidential coattails for his or her party candidates to win down the ballot. In this situation, it is not clear that the best candidate for the state office would be the winner.

Currently, only eleven states hold their gubernatorial elections at the same time as presidential elections are held, and two of these states are New Hampshire and Vermont, which hold their elections every other even year. Five states hold their gubernatorial elections in the odd numbered years, and thirty-six states hold their gubernatorial elections in the even, nonpresidential year. Again, two of these thirty-six states are New Hampshire and Vermont. A possible reform agenda item here would be for those nine states holding their elections in presidential years to shift them to an off-presidential year so the two sets of elections could be kept separate. This also suggests that if and when New Hampshire and Vermont change their gubernatorial terms to the four-year plan, they