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## THE EXECUTIVE ORDERS OF RECENT SOUTH CAROLINA GOVERNORS

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The executive orders issued by the last two governors of South Carolina indicate the changing nature of that officer in state affairs. Twenty years ago the governor's office was titular with the holder exercising ceremonial functions and certain low level administrative duties; consequently executive orders were seldom issued and then only in connection with duties clearly stated in the state constitution or in statutes of the General Assembly. But the office is no longer so narrowly defined and recent governors have widened the activity and the policy making role of the office; consequently executive orders are now issued frequently and deal with implied as well as enumerated powers of the governor's office. The trend should not be overstated, however, for most executive orders are still issued to execute traditional functions and only in part have they been used to give the governor's office wider dimension in decision making.

The activism and widened authority of recent governors can be traced to several factors. Federal concern with the quality of life throughout the nation has had a financial and ideological impact on state and local government and the governor's office has been one channel of federal funds and authority into South Carolina. This has given the governor a source of funds not controlled by the General Assembly and certain authority, particularly in the planning area, not granted by the state documents that defined his original role. On the other hand, the long established ceremonial role of the governor has prompted frustrated state officials and an irate citizenry to push him as a spokesman for the state toward federal programs designed to alter racial patterns in the South. In the same context he has had to respond, as chief law enforcement officer of the state, to the unrest and violence connected with such racial change. These two crisis roles have justified activism by the governor and made agencies responsive to his lead and this has carried over to some non-crisis situations. Beyond this, many governors have been identified with the attitude that favors modernization and industrialization as a means of improving the state's economy, and several governors in the past two decades have promoted measures to attract industry to the state and make government more responsive to the needs of a modernizing society. Further, the expectations and goals of recent governors, which may be defined as moderately activist, has been an additional factor redefining the role of the governor in state affairs. Finally the unusual six year term of Governor McNair allowed influence and experience to accumulate in the office that restructured relationships among elements of state government. Executive orders reflect this changed role of the governor and particular orders can be cited that show the impact of each of these factors. Again, however, the trend should not be

overstressed; the governor of South Carolina remains weak in comparison with the General Assembly which is still the dominant branch of South Carolina state government.<sup>1</sup>

The number of orders that have been issued by recent governors is comparatively small. Russell issued only eight in his two years of office; McNair had a total of 80 for his six years and in his four year term West issued 128. For the purposes of this study these orders will be divided into six major categories: local responsibilities, prisoners, legislative matters, administration, emergency powers and ceremonial functions.<sup>2</sup> The type of orders a particular governor issued during his term of office seems to have depended in large part on the problems he faced. Governor McNair issued a significant number in the emergency powers category, precisely because he was faced with several major breakdowns in security in different parts of the state. Governor West had the opportunity to revamp government agencies and, consequently, a large number of his orders were issued in the administrative category. Both governors issued a significant number in local affairs, but these were really beyond their control since such orders depend on events at the local level and governors merely respond to them.<sup>3</sup> Chart No. 1 below analyzes the executive orders of Governor McNair and Governor West according to the six major categories cited.<sup>4</sup>

Chart No. 1 Categorization of Executive Orders by Function

<i>Function</i>	<i>McNair</i>	<i>West</i>
1. Local responsibilities	22	48
2. Prisoners and the penal system	9	15
3. Legislature	0	2
4. Administration	20	49
5. Emergency powers	28	7
6. Ceremonial functions	1	7
Total	80	128

### *I. General Considerations.*

The authority of the governor to issue executive orders is not listed in the South Carolina Constitution or state statutes. There is common recognition among principal state officers, however, that the governor does have authority to issue them, either as a power implied by the Constitution or as a power inherent in his office. They agree as well that issuing orders is a narrow power for executing duties in specific situations, but that orders may not encroach on the wide powers of the General Assembly to regulate the society with general laws. Significantly there has been no challenge in recent years to the authority

<sup>1</sup>Based in large part on conversations with Phillip Grose Jr. and Dwight Drake, counsels to Governor West on August 1, 1973.

<sup>2</sup>The categories in all charts in this paper were formulated solely for this study and are intended only to point up the substance of the orders, not provide a behavioralist classification by which orders can be analyzed in other studies.

<sup>3</sup>Based on a letter from Phillip F. Grose, Jr. dated August 27, 1974.

<sup>4</sup>Information for all charts and all references to particular executive orders in this paper are based on a review of all orders issued between 1963 and January 15, 1975 as recorded in the South Carolina Secretary of State's office.

of the governor to issue orders from the courts, the legislature or executive agencies. This is not to say that there is no concern for the growing use of executive orders, for some legislators have lamented it, the Attorney General has questioned the scope of some decisions and, on occasion, executive agencies have ignored orders calling for administrative reorganization.<sup>5</sup> But these challenges have not created a major showdown in government over the validity of such orders.

Since executive orders are issued largely for particular situations there has been little long term interest in them by government, the public or the legal profession. Within government, these orders are treated casually; they are not compiled or published, and record keeping is not very exact. There is no central repository in the Governor's office and there is no one staff official responsible for a complete collection. As individual orders are issued they are sent to the Secretary of State, who signs them and attaches the state seal, affixes them to a blue backsheet and files them in chronological order in manila folders.

There seems to be no rigid structure for an executive order and three or four general formats occur throughout those issued by Governor McNair and Governor West. Some are short — only a paragraph — while others run up to five and six pages. A few are on legal size paper, while most are on business size paper. However, there is an effort in each one to explain the problem being addressed, justify the need for the order, either generally or specifically, and state the action that is being ordered as a remedy. There is a consistency throughout the last section of all orders where the date of the issuance is cited, the signatures of the Governor and the Secretary of State appear, and an impression of the Great Seal of South Carolina is made. Even here, however, there are slight variations. In some cases the Governor's office affixes the seal, but usually this is done at the Secretary of State's office. When agreements are made with other governors, as in some cases transferring prisoners from one state to another, the signature of the governor of the other state is often inscribed as well, but not always.

Each executive order contains a phrase, a sentence or sometimes a paragraph that cites and explains the source of authority used by the governor for issuing the order. There are a wide number of sources: the U.S. Constitution, Public Law, the South Carolina Constitution, South Carolina statutes, "general powers of the governor," previously issued executive orders and resolutions of the General Assembly. About 60% of the orders issued by Governor McNair were based on the South Carolina Constitution and South Carolina statutes while under Governor West those two sources were cited as the basis for the order in 63% of the cases. No other category was significantly cited as a source except "general powers of the governor" during the West administra-

<sup>5</sup>Letter of South Carolina Attorney General Daniel R. McLeod — dated May 12, 1974.

tion, which accounted for about 25% of the total. The sources and number of orders citing each is listed in Chart No. 2.

CHART NO. 2 Executive Orders by Source of Authority

<i>Source of Authority</i>	<i>McNair</i>	<i>West</i>
1. U. S. Constitution	10	7
2. U. S. statutes or Public Law	9	3
3. S. C. Constitution	0	7
4. S. C. Constitution and statutes	34	35
5. S. C. statutes	18	29
6. S. C. statutes and U. S. statutes	1	11
7. General powers of the governor	5	25
8. Previous executive orders	3	10
9. General Assembly resolutions	0	1
Total	80	128

Some executive orders are very explicit in the citation of sources and the appropriate paragraph of the South Carolina Code of Laws is cited, while in other cases only a general reference is made. Those cases dealing with local affairs, for example, tended to be specific under both McNair and West while those dealing with the reorganization of the governor's office were usually general. In total, about 40% of the orders under McNair were specific and under West about 42% were specific. The statistics for this study is listed in Chart No. 3.

CHART NO. 3 Executive orders categorized as to whether sources of authority was specific or generally implied.

<i>Category</i>	<i>McNair</i>	<i>West</i>
1. Specific	33	54
2. Generally implied	47	74
Total	80	128

The authority recognized as properly belonging to the Governor in the realm of executive orders extends to amending or invalidating those already issued, including those of previous governors. Several of the orders issued by Governor McNair and Governor West, for example, changed or invalidated their own orders and on one occasion West changed the organization of his office by amending an order of Governor McNair. On one occasion in 1974 Governor West withdrew an order several days after it was issued.

The Governor, then, has considerable control over his orders so long as he stays in areas of authority generally regarded as belonging to the Governor. When the General Assembly moves in an area, however, the Governor's order may be affected, as when paroles and pardons were removed from the Governor's authority in the Thurmond era with a constitutional amendment. More recently governors have considered commissions established by executive order to be superseded by acts passed by the General Assembly. This was the case, for example, with the Human Rights Commission in 1972 which was

created a year earlier by an executive order as part of the Governor's office, when it was established as an autonomous state agency by the General Assembly.<sup>6</sup> There have been other cases as well, and there is little doubt that the governor and all other officials regard an act of the legislature as superseding any executive order in the same area of governmental concern.

By modern practice the power to issue executive orders belongs to the person exercising the powers of the Governor, whether that is the actual holder of the office or another officer acting in the Governor's stead. Lieutenant Governor Morris issued two orders when acting as Governor at the time of Jimmy Byrnes's death, proclaiming a day of mourning with the first and dismissing state employees early on the day of the funeral with the second. On another occasion John West when acting as Governor, declared a state of emergency to deal with racial unrest while Governor McNair was out of the state. While there has been some debate among officials and among the public concerning the appropriateness of the orders issued by deputies, none of these orders were apparently challenged or invalidated by the governors themselves when they returned and took up duties again nor was there any challenge from the other two branches of government or by any other constitutional officer.

## II. CATEGORIES OF ORDERS.

The remainder of this paper reviews the six categories of executive orders made above and analyzes those categories according to the functions of various orders and the authority cited within them.

The category titled "local responsibilities" refers to duties given to the Governor by the Constitution, especially Articles IV, and various state laws in the operation of local governments of the state. The orders here deal with the suspension and removal of local officials from office for malfeasance or illness, call for special elections, initiate investigations in response to requests for changes of county lines and relieve probate judges when cases involve them in a conflict of interest. This area of responsibility is a traditional one for governors and is a simple administrative task involving only limited activism by the Governor. Significantly it accounted for one-fifth of the orders of Governor McNair and two-fifths of those of Governor West. Chart No. 4 indicates the number of cases in each category under the two governors.

<sup>6</sup>*State*, February 5, 1972, 1B From a practical point of view the Human Rights Commission was only advisory to other state agencies when described by the governor's order, but had power to act in certain situations under the statutory power granted by the General Assembly.

**CHART NO. 4 Executive Orders Concerned with Responsibilities of the Governor in Local Affairs.**

	<i>McNair</i>	<i>West</i>
1. Suspension, removal and reinstatement of local officials	5	31
2. Call for special elections	5	9
3. Establishment of investigation teams for county line changes	2	4
4. Appointment of officials	0	2
5. Relief of judges in conflict of interest cases	10	3
Total	22	49

The Governor has the power to suspend, remove and reinstate local officials within the state under certain conditions. The greatest number of orders in this area have dealt with suspension of local officials from office after they were indicted for criminal activity and appointed other persons to act in their positions until the trial in each case was complete. Normally a second order was issued after the trial removing the suspended official from office if he was found guilty and declaring his position vacant, or restored the official to office if he was not found guilty. For example, the Mayor Liberty was indicted in 1973 and an executive order suspended him from office pending the outcome of the trial. After conviction in early October a second executive order removed him from office and declared the office vacant. In a case involving a Charleston coroner indicted on criminal charges, a first order suspended him and a second order restored him to office when he was cleared of those charges. The same category includes suspension of local officials suffering prolonged illness that keeps them from exercising their duties. There has only been one case of this kind in recent years, that when Governor McNair suspended a gravely ill official, at the official's request, and appointed another person to fill his duties temporarily.

Except for temporary appointments to fill vacancies caused by suspension of local officials from office, the use of executive orders to appoint local officials is rare. Most local appointees of the Governor are filled by granting commissions, which is a process separate and distinct from issuing executive orders, although two orders issued by Governor West have dealt specifically with local appointments. In one case Governor West appointed two officials to the regional planning commission of Edgefield County as specified by the State Act that established the commission and in the other he appointed an election board official in Beaufort County.

There are several other situations in the area of local responsibility that call for executive orders. Those establishing elections usually deal with vacancies in the office of town intendants and occur when a quorum is no longer possible and residents in a town petition the governor to have new elections held. But other cases have occurred, such as when a congressional seat fell vacant upon the death of Mendel Rivers in 1971. In a second case Governor West called for a new school board election in Lancaster County after the regularly scheduled

election in 1972 was declared void because of irregularities. This category also covers requests for alterations of county lines, where the governor is required by the State Constitution to create a commission to examine the circumstances and later to conduct referenda in the two counties involved. Such requests usually arise in areas where county lines prevent normal government services in an urban area as in the case of a section of Dorchester County petitioning for change to Charleston County in late 1972. Finally this category includes cases where the Governor reassigns particular cases before a probate judge when the first judge declares himself to be involved in a conflict of interest. Most often the conflict of interest involved is merely that the probate judge is listed as a witness of the deceased's will.

In this "Local Responsibilities" category the authority for executive orders is almost always cited and is specific in its legal references. The S.C. Constitution and State Code are cited as sources in the overwhelming number of cases and sometimes the appropriate citation is quoted in its entirety as justification for the action taken. In the case of the U.S. Congressional election, the relevant portion of Article I of the U.S. Constitution was cited as authority.

In the "Prisoners and Penal System" category there are three kinds of cases: special moving of prisoners under extradition procedures and commutation of the death penalty to life imprisonment and special regulations concerning prisoners. Usually extradition cases are not handled with executive orders but through another process, although the Governor does have a role in all those involving South Carolina. The extradition here all involves fugitives already imprisoned in South Carolina or another state and the order spells out the arrangements for a special movement of such prisoners. Usually the prisoner is moved from one state to another to stand trial for criminal charges there and then returned to the first state to complete his sentence. Special arrangements for moving prisoners for other reasons, such as medical treatment or compassion, are spelled out in this way as well. For example, one prisoner held by South Carolina authorities was transferred to North Carolina authorities in February 1972 to allow him to visit his dying mother in that state. A small number of cases — only three in the last ten years — have commuted the death sentence to life imprisonment. The power of pardon and parole is exercised by an independent agency thereby limiting the governor's activity in this area. Occasionally special regulations are ordered for penal institutions such as an order in November 1974 instructing prison officials to abide by the United Nations "Standard Minimum Rules on Treatment of Prisoners" and Governor West's instruction in March 1974 modifying the rules for granting paroles to juvenile offenders. This category of orders is analyzed in Chart No. 5.



## CHART NO. 5 Executive Orders Dealing with Prisoners

<i>Category</i>	<i>McNair</i>	<i>West</i>
1. Moving prisoners between states	9	10
2. Commutation of the death penalty	0	3
3. Penal regulations	0	2
Total	9	15

The authority for executive orders in this category is not specifically stated in any of the orders. The rendition agreements with other states — while presumably relying on Article IV of the U. S. Constitution — do not mention it at all, perhaps because it is understood by all parties. Neither is specific reference made to Article IV of the S. C. Constitution where the Governor's powers in this area are enumerated. The three cases commuting the death penalty had only the reference, “. . . general authority invested in me as Governor by the Constitution and Laws of the State . . . ,” a common citation throughout the orders regardless of category.

Those orders classified as belonging to the Legislative category deal with a single subject, specifically calling the General Assembly into special session.

<sup>7</sup>Commissions and Councils created by the executive orders of Governor McNair:

- State Council on Vocational Education
  - S. C. Appalachian Advisory Committee
  - Council on Aging
  - Interagency Council on Arts and Humanities
  - S. C. Historic Resources Interagency Council
  - Interagency Council on Water Resources
  - Health and Welfare Council
  - Governor's Committee for Study, Evaluation and Planning in Criminal Administration
  - Interagency Council on Transportation
- Commissions and Councils created by the executive orders of Governor West
- S. C. State Manpower Planning Council
  - Office of Manpower and Organization Development
  - Office of Citizens Service
  - S. C. Council for Developmentally Disabled
  - Division of Economic Opportunity
  - Governor's Advisory Commission on Human Relations
  - Child Development Council
  - Division of Administration
  - Special Health Services Study Committee
  - Governor's Physical Fitness Advisory Council
  - Governor's Task Force for Economic Growth
  - Traffic Safety Advisory Committee
  - Governor's Energy Management Policy Council
  - State Social Development Policy Agency
  - Health Policy and Planning Agency
  - S. C. Advisory Committee on Science and Technology
  - Coastal Zone Planning and Management Council
  - Council on Cooperative Education
  - Governor's Committee on Criminal Justice, Crime and Delinquency
  - Advisory Board for Game and Freshwater Fisheries
  - Advisory Board for Marine Resources
  - Advisory Board for Law Enforcement and Boating
  - Division of Health and Social Development
  - S. C. Veterans Advisory Board
  - S. C. Health and Social Development Policy and Planning Council
  - S. C. Community Development Commission
  - S. C. Occupational Information System Consortium
  - State Commission on Secondary Education

As Chart No. 1 indicates, such orders are very limited in number, only 2 by Governor West, and those were issued only after close consultation with legislative leaders. In the early fall of 1974 he refused to issue an order reconvening the General Assembly to consider revision of the state constitution to permit "Pug" Ravenel to run for the office of governor because there was not sufficient support to assure passage of the amendment. The authority for the two orders was specifically mentioned and cited Article IV of the State Constitution as the source.

The executive orders classified in the category of "administration" have the most far reaching impact of all the orders, precisely because they have been an instrument by which the governor has sought to expand his role in administrative affairs. This category is dominated by the orders creating and revising special committees and councils to examine and coordinate government policy in particular areas. McNair issued fifteen orders creating nine such bodies and West issued 40 orders in this category creating or re-ordering 28 such bodies.<sup>7</sup> This is an important category for governors since the cases under McNair accounted for twenty five percent of all cases and under West it increased to 30% of all cases.

In a large number of cases the orders were an attempt to coordinate and interrelate the work of official state agencies dealing with different aspects of common problems, by bringing together their chief administrators to discuss overall strategy and provide general recommendations and guidelines. In a small number of cases, orders created councils that were structured to substantially change government, such as the State Planning and Grants Division, created by Governor McNair and revamped under West, which funneled federal money for planning into the state and provided a new source of data to the governor's office for decision making. A second example is the Governor's Management Review Commission which Governor West established during his first year in office to investigate the State Executive in general and suggest reforms that would consolidate administrative functions and make it operate effectively and efficiently. Finally a small number of orders created or revamped agencies that were really a part of the governor's working staff. The creation of the Office of Citizens Service, which has ombudsman functions, is an example of such orders. This administrative category is examined in Chart No. 6.

CHART NO. 6 Executive Orders Dealing with Administrative Matters

<i>Category</i>	<i>McNair</i>	<i>West</i>
1. Creation, revamping and terminating councils, committees and agencies	15	40
2. Special appointments	1	1
3. Police retirement referenda	0	3
4. Issuance of policy guidelines	3	4
5. Interstate agreements	1	1
Total	20	49

The authority for these new organizations has come largely from federal law, such as the Vocational Education Acts of 1963 and 1967, the Arts and Humanities Act of 1965 and the Water Resources Act of 1969. A significant number, however, were created without specific authority being cited. For example, the order creating the Governor's Management Review Commission had no statutory or constitutional justification whatsoever, but was justified in terms of need. The order implied that the Governor's office itself had the power necessary for the commission to review the structure of administration in the state. In fact, most orders of this category are justified on the basis of need or appropriateness and usually contain only the words ". . . authority vested in me under the Constitution and Laws of the State . . ." as justification. This generalness contrasts sharply with the specificity of the orders issued in several other areas, such as local affairs, undoubtedly because governors may feel the need to be specific when interfering in government at the local level while being less precise in matters involving their own office. Moreover, the administrative powers of the governor in state documents is less clearly defined and must be implied from several different citations and then only in a general sense.

Four other matters are included in this "Administrative" category. On one occasion in 1965, Governor McNair appointed a member of the State Wildlife Commission to represent the state on a federal panel as specified by federal law. In a second area the governor called special referenda for police in certain cities to accept coverage in the police officers retirement system. In both of these sub-categories the authority noted was specific and U.S. Public Law was cited as the legal justification. There is little choice for the governors here as in both cases the action of the governor merely executed a process laid down by such federal law. In a third type of case, however, the governor exercised more initiative and influence, for the executive orders specified procedures and guidelines for certain agencies to follow. Examples are Governor West's order in September 1972 outlining procedure for determining sites for disposal of dredge soil, an important environmental consideration, guidelines for magistrates to conduct speedy trials in 1973 and the establishment of regional planning areas for the state in 1972. Most of these orders were justified on the basis of specific law, such as the U.S. Rivers and Harbor Act, or specified S.C. statutes, and in only one case was the reference made to the general powers of the governor. Finally this category deals with interstate agreements, as when Governor West issued an order giving temporary approval to an agreement among several states until the S.C. General Assembly could act on the measure. No authority was cited. This last type of order is unusual since interstate compacts are usually recorded in another form and not issued as executive orders.

Emergency powers have been used little by Governor West and only in connection with natural disasters — a snowstorm in Clarendon County, the collapse of the bridge to Hilton Head Island and the national energy crisis.

Governor McNair, however, used them in connection with serious civil disorder in 1968 and 1969 — racial unrest at Orangeburg and Gaffney, the hospital strike at Charleston, and the student strike at the University of South Carolina. These orders, some 28 in number or about 35% of all of McNair's orders, properly indicate the problems of his term of office when, by the circumstances of the time, he had to devote most of his last two years in office to the problems of public security. Regardless of the emergency, however, whether issued under McNair or West, the orders had a strikingly similar format. Each order spelled out the areas where the state of emergency was in effect, the limitations on public movement and freedoms, and which state law enforcement officials were to have responsibility for implementation. Executive orders were used in each case to declare the emergency, redefine the area concerned and finally to declare the emergency at an end. In all of the orders in this category only general reference was made to the Constitution and Laws of South Carolina as the basis for issuance.

The last category, that of ceremonial functions, consists of orders proclaiming special days such as Law Day and the declaration of a holiday for the Savings and Loan Association. This category includes orders according special recognition to outstanding individuals such as those honoring former Governor James Byrnes at his death in April 1972. The authority cited in orders in this category is usually the constitution and laws of the state without specific reference but one case used a General Assembly resolution as justification for its issuance.

### III. OBSERVATIONS

Executive orders are not yet a powerful tool for the Governor of South Carolina in developing the authority of his office, but they have been of some use in expanding the role of the governor. In particular there has been considerable use of them, by McNair and by West, in asserting the governor's role as chief administrator of the state. The executive orders themselves have not given the governor more power, but they have been used to legitimize several key moves that have given him more stature and more influence in the administrative area. The Budget Management Review Commission gave Governor West an opportunity to create a body that advocated a stronger administrative role for the governor and to push for the various administrative reforms that it advocated. Governor McNair's creation of the State Planning and Grants Division created a whole new agency of state government that involved itself in a wide variety of government functions in the state, and that was responsible to him and subject to his direction.

The stated authority for executive orders is not always specifically drawn, but in examining the orders it would appear that there is clear authority in nearly every case. The use of general phrases, such as "General Power invested in me by the Constitution and Laws of South Carolina . . ." may seem at first glance to be a vague statement, but the phrase appears to be an

acceptable alternative to listing all the specific references. The use of specific or general citations may well belong to the discretion of the drafter of the particular order. What is clear, however, is that implied powers are now being used more by governors as well as the clearly enumerated powers.

It must be realized that as the governor's status grows as an activist on the political scene, his authority in every field will not always be clearly cited, but derived from an overall feeling of what the office demands and what is expected of him by the General Assembly and the public. Significantly, the generalness of authority for many orders has not been challenged, precisely because the other actors believe he does have the authority for those actions. The test will come — and it will come — when the authority to issue an order is challenged.

Executive orders are unlikely to significantly increase the governor's powers although it may provide him with some gains. Executive orders have never been considered as very important and have not been challenged precisely because the governors have used self restraint and used them for narrow administrative purposes accepted by the other political actors in the system. It appears now that the governor of South Carolina is gaining more stature and as a reflection of that new stature his orders are somewhat wider in scope. But nearly all orders are still acceptable to the level of power expected of him and he has not attempted to use them to change the system. Should he attempt to, the General Assembly, the state courts and the Attorney General appear likely to challenge him, and, given present power relationships of South Carolina, they will carry the day. Rather if the governor gains power and authority — and it is not altogether clear that he will, — it will be through a number of devices, such as Chairman of the Budget Control Board, as Legislative Leader, as Administrative Coordinator, and perhaps even as party chief. It seems, however, that executive orders will be a reflection of his authority as he gains power rather than as the cause of any such gain.