



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE April 2024

TO Senator Eric Barlow

FROM Katie Adams, Staff Attorney

SUBJECT Executive Orders

Executive Orders – General Background

A governor may issue executive orders to implement constitutional and lawfully authorized statutory powers. In doing so, he may properly execute the law but he cannot make new law. Clearly identifying that dividing line can be difficult.

The executive power is vested in the Governor under the Wyoming Constitution.¹ By statute, that power is described in more detail:

In accordance with the Wyoming constitution, the governor is the chief executive officer of the state of Wyoming. The governor shall formulate and administer the policies of, and shall exercise general supervision, direction and control over the executive branch of state government.²

Neither the Wyoming Constitution, nor Wyoming statute, confers explicit general authority upon the Governor to issue executive orders. The Constitution makes no mention of “executive orders”; rather, it speaks to “proclamations” of the Governor.³

¹ Wyo. Const. art. 4, § 1.

² W.S. 9-1-201.

³ The references to proclamations in the Wyoming Constitution are all to specific items. Wyo. Const. art. 3, § 7 (by proclamation, the Governor may call the legislature into special session); Wyo. Const. art. 21, § 9 (by proclamation, the governor shall fix the date of an election, after admission of Wyoming as a state); Wyo. Const. art. 21, § 13 (by proclamation, the Governor shall convene the first legislature).

By statute, the Legislature has implicitly recognized the authority to issue executive orders in carrying out the executive function. Most of those statutory provisions appear in the context of military or homeland security issues.⁴ While statutes can recognize the authority of the Governor to issue executive orders in properly fulfilling Constitutional duties, they cannot unlawfully delegate to the chief executive the power to make law.

The Governor may not exercise any legislative function except that granted to him expressly by the terms of the constitution.⁵ In Wyoming, the Constitution grants the Governor some authority to effectuate legislation, by use of the line-item veto (as interpreted by the Wyoming Supreme Court).⁶ Beyond that, in reference to the Governor's role in legislating, the Constitution provides only that:

He shall have power to convene the legislature on extraordinary occasions. He shall at the commencement of each session communicate to the legislature by message, information of the condition of the state, and recommend such measures as he shall deem expedient[.]⁷

In at least two cases, the Wyoming Supreme Court has made clear that executive orders or proclamations cannot infringe on the lawmaking function. In one, a statute provided that mileage expenses allowed for state and county officers could not exceed eight cents per mile.⁸ The Court determined that the statute provided a cap of eight cents per mile and reimbursement must be based on actual expenses.⁹ The Court rejected the claim that the Governor had, pursuant to different provisions of law and his broad general executive power vested by the Constitution, established a flat rate of six cents per mile.¹⁰

Half a century later, the Court was confronted with a statute authorizing the Governor to issue proclamations concerning the importation of livestock.¹¹ The statute was challenged

⁴ See W.S. 19-13-104(c)(i) for an example of explicit authority to issue orders: The Governor may “[m]ake, amend and rescind the necessary orders, rules and regulations to carry out [the Wyoming Homeland Security Act] within the limits of the authority conferred upon him herein, with due consideration of the plans of the federal government.” For implicit recognition of the Governor's authority to issue executive orders, see W.S. 16-4-204(c) (providing that fees for copying public records may only be assessed if authorized by duly enacted or adopted statute, rule, resolution, ordinance, executive order or other like authority).

⁵ 38 *Am. Jur.* 2d, Governor, § 4 (1999).

⁶ *Mgmt. Council of the Wyo. Legislature v. Geringer*, 953 P.2d 839, 843–46 (Wyo. 1998) (“holding that the Governor has authority to veto substantive provisions of any bill making appropriations, even though the vetoed substantive provision does not appropriate money”).

⁷ Wyo. Const. art. 4, § 4 (emphasis added).

⁸ *State ex rel. Murane*, 70 P.2d 888, 890 (Wyo. 1937).

⁹ *Id.* at 893–94.

¹⁰ *Id.* at 895.

¹¹ *Mendicoa v. State*, 780 P.2d 1346, 1348 (Wyo. 1989).

as an unlawful delegation of legislative authority.¹² First, the Court concluded that the language used in the proclamation had the same meaning as the words used in the statute.¹³ Since the proclamation regulated only that which was intended by the Legislature to be regulated, the Governor did not exceed his authority in its promulgation.¹⁴ The Court then turned to whether it was proper for the Legislature to delegate the authority to the Governor to promulgate the proclamation. In answering that question, the Court explained the following:

Whether it was proper for the legislature to delegate the authority to the Governor to promulgate the proclamation turns on the distinction between the delegation of the power to *make* law and delegation of the power to *execute* a law properly made.

This true distinction, upheld by the United States Supreme Court, “is between the delegation of power *to make the law*, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its *execution*, to be exercised under and in pursuance of the law.” The first cannot be done, but there is no valid objection to the latter. So long as the legislature “shall lay down by legislative act an intelligible principle to which the person or body authorized to (exercise the delegated authority) is directed to conform, such legislative action is not a forbidden delegation of legislative power.” The power to delegate authority to the executive branch to execute the various statutes is a recognition of the great disadvantage to the legislature “in solving many of the complex and difficult problems with which it is confronted,” if it were prohibited from delegating such ministerial authority.¹⁵

While courts, especially at the federal level, have been criticized for allowing the executive to engage in lawmaking through use of executive orders,¹⁶ the Wyoming Supreme Court

¹² *Id.* at 1346, 1348.

¹³ *Id.* at 1350.

¹⁴ *Id.*

¹⁵ *Id.* (citations omitted).

¹⁶ See *The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?*, Testimony of William J. Olson before the Subcommittee on Legislative and Budget Process, Committee on Rules, United States House of Representatives, October 27, 1999. At that time Mr. Olson’s research had revealed only two cases in which the judiciary had struck down completely an executive order of the President.

has made it clear that the power to make the law cannot be accomplished through executive fiat.¹⁷

Finally, though the COVID-19 pandemic resulted in the use of executive orders and at least two lawsuits regarding their use, none of the lawsuits appear to have resolved any questions on the scope or permissibility of executive orders in Wyoming.¹⁸

¹⁷ In the context of delegation of legislative authority to administrative agencies, the Wyoming Supreme Court has stated: “The thrust of these cases is that explicit legislative standards are required when an individual is deprived of a liberty or property interest. Express constitutional legislative power cannot be delegated in such instances.” *Wyo. Coal. v. Wyo. Game & Fish Comm’n*, 875 P.2d 729, 733 (Wyo. 1994). In upholding the Legislature’s delegation to the Game and Fish Commission to establish hunting seasons, the Court noted: “[W]e cannot overlook the fact that the action of the Commission must be tested in the cauldron of administrative rulemaking proceedings. The rules and regulations promulgated by the Commission must be adopted in accordance with WAPA, WYO. STAT. 16-3-103, which articulates the minimum requirement for rulemaking by agencies.” *Id.*

¹⁸ See, e.g., Leo Wolfson, *Health Order Lawsuit Dismissed by Judge*, Cody Enterprise (May 24, 2021), https://www.codyenterprise.com/news/local/article_e9d9d39c-bcbd-11eb-8364-8b37dac4a776.html (reporting on dismissal of a lawsuit filed in state court requesting a court order to make current and future COVID-19 health orders issued by Governor Gordon null and void); Ellen Gerst, *Lawsuit Over COVID Mandates in Albany County Dismissed*, Casper Star-Tribune via Wyoming News Exchange (Mar. 2, 2022), https://www.wyomingnews.com/news/from_the_wire/lawsuit-over-covid-mandates-in-albany-county-dismissed/article_2858d6ea-0071-5c2a-839d-8881fe571cc4.html (reporting on dismissal of a federal lawsuit seeking a jury trial and an injunction regarding COVID-19 mandates and policies in the state).