



## WYOMING LEGISLATIVE SERVICE OFFICE

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# *Issue Brief: Executive Power*

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by:

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### **ISSUE**

Provide a context for understanding the "executive power" that is vested in the Governor under the Wyoming Constitution. Identify the source of authority for individuals, departments, agencies, boards and commissions within the executive department of Wyoming government.

### **SUMMARY**

The state Constitution vests "executive power" in the Governor. However, there is no constitutional or statutory definition of the term. Further, the Wyoming courts have not interpreted the provision to create a definition for executive power. Thus, an understanding of the term must be derived from its plain meaning as well as from historical construction. Executive power, generally speaking, is the power to administer the laws and to carry them into effect. Reasonable minds have held differing views as to what this executive power is. The constitution appears to allow the Legislature to further define the executive power of the Governor and to delegate responsibility to the Governor and other state officers.

The Wyoming Constitution creates an executive branch composed of a Governor, Secretary of State, Auditor, Treasurer, and Superintendent of Public Instruction. While a few additional appointed officials are created by the state Constitution, the Legislature is authorized to create other offices as it deems necessary. Presently, there are fifteen principle departments of the state's executive department, if one includes the Attorney General, in addition to the elected officials. Several separate operating agencies and

numerous boards and commissions also contribute to the structure of the executive department.

### **BACKGROUND**

Article 2 of the Wyoming Constitution divides the powers of government into three departments: the legislative, executive and judicial. Article 4 addresses the executive department and, in Section 1 states, "The executive power shall be vested in a governor, who shall hold his office for the term of four (4) years and until his successor is elected and duly qualified." The article goes on to delineate the powers and duties of the Governor. The Governor is the commander-in-chief of the military forces of the state, except when they are called into federal service. He has the power to approve or veto legislation and to convene the Legislature on extraordinary occasions. The Governor has the power to issue pardons and reprieves. He has the power to make appointments. The Governor is required to communicate to the Legislature at the commencement of each session information on the condition of the state, and recommend such measures as he shall deem expedient. He is required to transact all necessary business with officers of the government. The Governor is required to expedite actions of the Legislature and "take care that the laws be faithfully executed."

At Article 4, Section 11, the Constitution states, "There shall be chosen by the qualified electors of the state ... a secretary of state, auditor, treasurer, and superintendent of public instruction.... The legislature may provide for such other state officers as are deemed necessary." The next section says that "[t]he powers and duties of the secretary of state, of state auditor, treasurer, and

superintendent of public instruction shall be as prescribed by law."

The five elected state officials are the core of the state's executive department. However, numerous other entities contribute to the administration of the state and are located within the executive department. Table 1 (attached) illustrates the Wyoming executive department and identifies the legal source of their authority. Apart from the five elected state officers, two other officers (the State Engineer and Inspector of Mines) are mentioned in the state's Constitution. Both are appointed by the Governor. There are 15 departments of state government in the executive branch, if one includes the Attorney General's office. Further, a number of executive agencies have been designated as "separate operating agencies."

In addition to the departments and agencies are numerous state boards and commissions. The five elected state officers serve on the Board of Land Commissioners, State Loan and Investment Board, State Building Commission, and the Wyoming On-line Government Commission. All but the Superintendent of Public Instruction also serve on the State Canvassing Board. The Governor makes appointments to about 130 boards and commissions. Of those, approximately 44 require Senate confirmation.

### EXECUTIVE POWER

As already stated, Article 4, Section 1 of the Wyoming Constitution vests executive power in the Governor. It is not entirely clear as to what this provision means. The language remains unchanged from the original version that was adopted by the state in 1889. The Wyoming Supreme Court has never created a definition for executive power. Thus, it is reasonable to suggest that the plain meaning of the words provide context.

The plain meaning of the term may be derived from its common use. American Jurisprudence, a legal encyclopedia, defines executive power as "the power to execute the laws, that is, to carry them into effect, as distinguished from the power

to make the laws and the power to judge them." (16A Am.Jur. §255) The executive power is said by some to be more limited than the legislative powers, extending merely to the details of carrying into effect laws enacted by the legislature as they may be interpreted by the courts. Executive power also includes the power to administer the laws, and thus the promulgation of rules and regulations for such purpose is also an executive function. (*Ibid.*) Generally speaking, executive power includes the power to issue pardons and reprieves, and to grant or revoke paroles; the executive authority to decide whether to prosecute and which alternative charges to pursue rests with the executive branch. The executive power need not, in all cases, be exercised directly and exclusively by the chief executive, but may be, in some instances, and most frequently is, delegated to subordinates. (*Ibid.*)

### WYOMING CONSTITUTIONAL CONVENTION

Another mode of ascertaining the meaning of the provision of the state Constitution that vests executive power in the Governor is to examine the intent of those who created the provision. Since the provision has remained unchanged since its inception, the authors were the framers of the state's Constitution. The meaning intended by the framer's can be derived from the record of the convention and debates.

Francis E. Warren, Territorial Governor of Wyoming, arranged for a constitutional convention to be held at the new capitol building in Cheyenne in September, 1889. Fifty-five delegates from across the state were selected to attend the convention, but only 49 appeared at the convention. Melville C. Brown, a Laramie attorney and judge, was elected president of the convention and proved to be among the most influential delegates. According to T.A. Larson, Wyoming's premier historian, while Brown was a Republican, as were the majority of delegates, the party leaders of the territory did not favor him and he was said to have presided without partisanship.

The composition of the executive branch did not appear to be a particularly contentious issue.

According to Larson, the most important committees of the convention dealt with the legislative department; the judiciary; boundaries and apportionment; taxation, revenue and public debt; and railroads and telegraphs. The major issues in the convention included the organization of new counties, the structure of the judicial department, female suffrage, constitutional literacy, apportionment, coal tax, the location of state institutions, water rights, and civil service reform. In fact, a mere 15 pages of the 864-page journal of the proceedings and debates, covering only two days was dedicated to the executive branch. The delegates debated the role of the Secretary of State as acting Governor, the Governor's veto power, the need for a state Auditor, the role of the Superintendent of Public Instruction, the salary of officers, the role of the State Examiner, the ability of the Supreme Court to render advisory opinions, the role of the Attorney General, the role of county auditors, executive power, and the provision of other state officers by the legislature.

The deliberation over executive power is limited to a single motion at the convention and just three comments. In addressing executive power, Judge Brown offered an amendment saying, "The executive power shall be vested in the governor, secretary of state, auditor, treasurer, and superintendent of public instruction, and such other officers as may be prescribed by law, and who shall hold their offices for four years and until their successors are duly elected and qualified." Anthony Campbell, a Cheyenne lawyer and former U.S. attorney for the Territory, objected, saying that there "is a difference between executive power and executive department" and that, while the executive department may consist of several different officials, the executive power should be vested in the Governor. Asbury Conaway, a lawyer and associate justice of the Territorial Supreme Court from Sweetwater County, agreed with Campbell and said that the amendment was not necessary. Conaway reasoned that executive department and executive power have entirely different meanings. The section, he said, provides for a Governor and what power he shall be vested with, and for other

officials and with what authority they shall be vested. Brown's amendment failed.

Another interesting comment related to the role of the Governor that surfaced in the convention's deliberations came when discussing the salary for the judiciary. One delegate suggested that the Chief Justice's salary should be higher than that of the Governor because, while the Governor could hold another job, the Chief Justice could not.

**Other state constitutions.** An analysis of the meaning of "executive power" from the jurisprudence of neighboring states whose constitutions served as a model for the Wyoming Constitution would likely not add anything more to the discussion. In convention debate, John Riner, a Cheyenne lawyer, complained that "members of the committees take out this and that from the different state constitutions without taking into consideration for a moment whether they affect the local conditions we have or not." Other delegates, such as former Territorial Governor George Baxter justified borrowing by arguing that the constitutions of other states represented the best efforts of the ablest men in ages past. According to Larson, heavy borrowing from earlier constitutions has been the standard practice in state constitution making. Larson completed a section-by-section analysis of the Wyoming Constitution and found that Wyoming appeared to have borrowed most heavily from the constitutions of North Dakota, Montana, and Idaho. However, Article 3 on the executive department did not appear to be borrowed from any of these.

#### **ACADEMIC EVALUATION OF THE EXECUTIVE DEPARTMENT**

Another tool that may be useful in understanding the division of executive power in Wyoming would be to explore the manner in which it has been evaluated over time. Numerous academics and historians have commented on the structure of Wyoming's executive department. An examination of their writing may contribute to a better understanding of what is meant by executive power and the contemporary understandings of the division of power.

**1904- Hebard.** The first textbook on Wyoming government was written by Grace Hebard, a Professor of Political Economy and Instructor in Wyoming History at the University of Wyoming, and published in 1904. Professor Hebard asserts that state constitutions have a tendency to restrict the authority of the governor as a result of the distrust for the executive that developed from the colonial experience. Hebard describes the powers and duties of the Wyoming Governor as those outlined in the state Constitution and asserts that "great influence and authority are vested in the Governor, and in his power to appoint many of the State officers who are not elected by the people." Hebard also points to the Governor's role on the Board of Land Commissioners and State Board of Charities and Reforms as being a significant indicator of the Governor's power. Hebard also points out that "[t]he most prominent State offices are filled by persons elected by the people, and the duties of the officers are defined by the Constitution and the legislative enactments."

**1925- Dixon and Downing.** In 1925, the Wyoming Legislature passed a law stating that all public schools must provide instruction in the essentials of the U.S. and Wyoming Constitutions. A.H. Dixon and C.O. Downing wrote a text to prepare students for the test over constitutional principles that was required by the law as a condition of graduation. They described the Governor as the "Chief Executive Officer" of the state and recognized the importance of his appointment power, but they also recognized the important role of the other four elected state officers, both in the capacity of their offices and in their roles as members of administrative boards and commissions of the state. Dixon and Downing said, "We cannot fail to observe the importance of the elective officers and the important part they have in directing the state government."

**1950s- Trachsel and Wade.** In the early 1950s, Herman Trachsel, Professor and Head of the Political Science Department at the University of Wyoming, along with Ralph Wade, Associate Professor of Political Science, wrote another text on Wyoming government. Their text calls for a need for reorganization of the executive

department, suggesting that greater accountability to the Governor would result in a more efficient and integrated administrative system. Trachsel and Wade state, "The *executive power* is divided between the governor, [the secretary of state, auditor, treasurer, and superintendent of public instruction], and numerous boards and commissions. Although it is the duty of the governor to see that the laws are faithfully executed, the courts have consistently held that these broad grants of power give the governor no specific authority to act. His powers must come from more specific provisions in the constitution or statutes. In construing the powers of the governor the courts have followed the principle of strict construction and held that where power is not specifically granted the governor does not have it." In short, they argued that the presence of the four other elected officers tends to diminish the power of the Governor and that greater accountability in the agencies of the state to the Governor would enhance the administrative system.

**1966- Richard.** In 1966, John Richard, Professor of Political Science at the University of Wyoming, first published his textbook for Wyoming government that reiterated many of the themes already developed: the diffusion of executive power, the importance of the appointment power, and the Governor's role on state boards and commissions. Richards summed-up the executive power of the Governor by stating, "As Chief Executive, the governor has powers of appointment and removal, personnel supervision and budget control, pardoning and clemency, and is the commander-in-chief of the National Guard of the state." However, Richard also focuses on the personal attributes of the incumbent as lending to the relative strength or weakness of the office of the Governor. Thus, Richard concludes that gubernatorial leadership is "largely personal achievement and perseverance rather than a result of hierarchical authority."

#### **WYOMING GOVERNMENT REORGANIZATION ACT OF 1989**

The executive department has undergone numerous periods of growth and reorganization

since it was formed. The most significant contemporary state government reorganization began over a decade ago with the passage of the "Wyoming Government Reorganization Act of 1989." (W.S. 9-2-1701 et seq.) The Act established a framework for the executive department, limiting the number of departments to ensure state resources are effectively and efficiently applied to implement programs and policy. While the Act established a framework for reorganization, it required that separate acts create the new departments of state government.

The Act requires that the executive department shall be organized into not more than 15 principal departments. The offices of the Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney General are excepted from the reorganization plan. It is notable that the Attorney General is the only appointed individual to be so excluded and suggests a recognition of some distinction of that office. The Act also designates separate operating agencies which are independent and distinct from departments because of their quasi-judicial responsibility or because of their unique, specialized function which precludes their inclusion in another department. Separate operating agencies fall outside the structure imposed by the Act. Any entity that is not excluded and not identified as a separate operating agency must either be organized under one of the principal departments or established by the legislature as a temporary agency for a period not exceeding four years. (Although it is not clear that this requirement has always been practiced.)

The Act gives the Governor more direct authority over the executive department by creating a cabinet-type organization. This is in contrast to an administrative system that relied more heavily on individual boards and commissions to conduct the business of the state. The Governor is given the authority to appoint department directors, who serve at his pleasure, with the advice and consent of the senate. The Governor also appoints the members of advisory councils associated with departments. Finally, the Governor is authorized to approve transfers of positions, persons,

property and funds among divisions within a department.

### CONCLUSION

Executive power and executive department are terms with different meanings. The Constitution creates an executive department which is composed of five elected officials and such other officers as the legislature deems necessary to create. The cabinet-style organization imposed by the Wyoming Government Reorganization Act of 1989 creates an administrative structure in which the Governor has enhanced administrative control over the executive department and is aided in his charge to take care that the laws be faithfully executed. However, that control does not appear to be absolute and is, to some degree, shared with the Secretary of State, Auditor, Treasurer, and Superintendent of Public Instruction.

Executive power is the power to carry the laws into effect. By vesting the executive power in the Governor, the Wyoming Constitution makes it the Governor's responsibility to carry out the laws that are created by the Legislature. The Governor is given the administrative responsibility of executing the laws of the state of Wyoming.

### ADDITIONAL READING

Dixon, A.H. and C.O. Downing, *Civil Government of Wyoming*, (The Bailey School Supply House: Gillette, WY, 1926)

Hebard, G., *History and Government of Wyoming*, 1926 Ed., (C.F. Weber & Co.: San Francisco, CA, 1926)

*Journal and Debates of the Constitutional Convention of the State of Wyoming*, (The Daily Sun, Book and Job Printing: Cheyenne, WY, 1893)

Larson, T.A., *History of Wyoming*, 2d Ed., Rev., (University of Nebraska Press: Lincoln, NE, 1978)

Richard, J., *Government and Politics of Wyoming*, 3d Ed., (Kendall/Hunt Publishing Co.: Dubuque, IA, 1974)

Trachsel, H. and R. Wade, *The Government and Administration of Wyoming*, (Thomas Y. Crowell Co.: New York, 1953)

**TABLE 1. WYOMING EXECUTIVE DEPARTMENT.**

**Constitutional Officers (Elected)**

- Governor
- Secretary of State
- Auditor
- Treasurer
- Superintendent of Public Instruction

**Constitutional Officers (Appointed)<sup>1</sup>**

- State Engineer
- Inspector of Mines<sup>2</sup>

**Constitutional Boards and Commissions<sup>3</sup>**

- Board of Land Commissioners<sup>4</sup>
- Board of Control<sup>5</sup>
- Board of Equalization
- University of Wyoming Board of Trustees

**Statutory Departments ("Cabinet")**

- Dept. of Administration & Information
- Department of Agriculture
- Attorney General's Office<sup>6</sup>
- Department of Audit
- Department of Corrections
- Department of Employment
- State Engineer
- Department of Environmental Quality
- Department of Family Services
- Game & Fish Department
- Department of Health
- Department of Revenue
- Dept. of State Parks & Cultural Resources
- Department of Transportation
- Department of Workforce Services

**Statutorily Identified "Separate Operating Agencies"<sup>7</sup>**

- Adjutant General
- Office of Administrative Hearings
- State Building Commission
- Community College Commission
- Environmental Quality Council
- Board of Equalization
- Geological Survey
- Oil & Gas Commission
- State Board of Parole
- Public Defender
- Public Service Commission
- Office of State Lands & Investments
- School Facilities Commission
- University of Wyoming
- Water Development Office

**Statutory Boards (Elected Officers)**

- State Loan & Investment Board<sup>8</sup>
- State Building Commission<sup>9</sup>
- Wyoming On-line Government Commission<sup>10</sup>
- State Canvassing Board<sup>11</sup>

**Other State Agencies<sup>12</sup>**

- Department of Fire Prevention & Electrical Safety
- Insurance Department
- Retirement System

**Statutory Boards and Commissions<sup>13</sup>  
(Appointed by the Governor & Confirmed by the Senate)**

- Aeronautics Commission
- Board of Agriculture
- Agricultural & Natural Resource Mediation Board
- Board of Barber Examiners
- Wyoming Business Council
- Children's Trust Fund Board
- Wyoming Community Development Authority
- Wyoming Cultural Trust Fund Board
- Board of Dental Examiners
- State Board of Education
- Wyoming Game & Fish Commission
- Geological Survey Board
- Board of Geologists
- Wyo. Higher Education Assistance Authority
- Industrial Siting Council
- Board of Insurance Agents' Examiners
- Commission on Judicial Conduct & Ethics
- State Library Board
- Livestock Board
- Board of Medicine
- Mental Health Professions Licensing Board
- State Mining Council
- Natural Gas Pipeline Authority
- Occupational Health & Safety Commission
- Board of Outfitters & Professional Guides
- Pari-Mutuel Commission
- Parks & Cultural Resources Commission
- Board of Pharmacy
- Board of Psychology
- Real Estate Commission
- Wyoming Retirement System Board
- State Telecommunications Council
- Wyoming Transportation Commission
- Unemployment Insurance Commission
- Board of Veterinary Medicine
- Water Development Commission

<sup>1</sup> Historically included state geologist and state examiner as well.

<sup>2</sup> Located in Department of Employment.

<sup>3</sup> Historically included Board of Charities and Reforms.

<sup>4</sup> Composed of 5 elected officers.

<sup>5</sup> Located in State Engineer's Office.

<sup>6</sup> Excepted from "department" status under W.S. 9-2-1704(a).

<sup>7</sup> See W.S. 9-2-1704(d)

<sup>8</sup> Composed of 5 elected officers.

<sup>9</sup> Composed of 5 elected officers.

<sup>10</sup> Composed of 5 elected officers.

<sup>11</sup> Composed of all but superintendent of public instruction.

<sup>12</sup> Entities not within a department and not statutorily defined as a "separate operating agency."

<sup>13</sup> Excluding those already listed.