

MAINE STATE LEGISLATURE

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TO: David E. Boulter, Director
FROM: Margaret J. Reinsch, Principal Analyst

re: Executive orders

You asked for a brief discussion of executive orders: what they are, their powers and their limitations. I hope the following information answers your questions.

DEFINITION

As simple as it sounds, an executive order is simply a document that the governor issues and declares to be an "executive order." Neither the Maine Constitution nor the Maine Revised Statutes contain definitions, general authority or standards for executive orders. Even without written authority, however, Gubernatorial executive orders are recognized, as Presidential executive orders are on the federal level, as the chief executive's legitimate exercise of powers granted to the office by the Constitution or by statute. Presidential executive orders have been upheld by the courts as having the force of law. Although no relevant case law exists in Maine, the treatment is expected to be the same.

SOURCES OF AUTHORITY

The Maine Constitution provides two broad sources of executive authority. Article V, Part First, §1 provides that "The supreme executive power of this State shall be vested in a Governor." Section 12 provides that "The Governor shall take care that the laws be faithfully executed." To the extent that an executive order falls under either one of these sources of power - and most, if not all, will - it will be presumed valid. A question could arise, however, if the executive order is interpreted as making law and therefore exercising "legislative power" that is vested solely in the Legislative Branch by Article IV, Part First, §1 of the Maine Constitution. Again, no relevant Maine case law exists, but Presidential executive orders are routinely upheld despite the challenge that

they represent law making, a function reserved to the Congress. Apparently, the definition of “executive power” is interpreted broadly on the federal level.

POWERS AND LIMITATIONS

Generally, executive orders regulate actions of State officials and agencies. They usually do not affect private citizens directly, although they may affect individuals who come in contact with State agencies or State employees. Limitations on executive orders, other than their sources of authority, are not stated in the statutes or the Constitution. There is no authority for an executive order to direct activities within the Legislative or Judicial Branches, and I have found no record of any President or governor who attempted to use an executive order to do so. However, an executive order may apply to administrative functions of the government that directly affect the use of State services by the Legislature and the Judiciary (e.g., postal services).

An executive order is often used to establish a study task force on a specific subject or a commission to oversee a particular situation or controversy. Sometimes permanent advisory commissions are created by executive order. Occasional these are later codified into statute, sometimes with specific reference to the original executive order. The question was raised whether the fact that the Legislature had an opportunity to create a study commission and declined to do so limits the Governor’s authority to create a study group on the same subject by executive order. The answer is no; whether the Legislature refused to create a study commission or did in fact create such a group has no effect on the power of the Governor to use an executive order to reach the same result.

See Attachment 1 for a list of executive orders issued by Governor King.

DURATION

The duration of executive orders appears to be indefinite; an executive order retains its force beyond the term of office of the executive issuing it, unless the order itself contains its own expiration date. Presidents and Governors have issued executive orders rescinding or amending executive orders issued by their predecessors.

Attachment 1: Governor King's executive orders

The following is a list of the executive orders issued by Governor Angus King.
(Executive orders are numbered on a Fiscal Year basis.)

5	FY 94/95	Special Budget and Expenditure Order of 1995	January 5, 1995
6	FY 94/95	An Order Regarding Administrative Rulemaking	January 5, 1995
7	FY 94/95	An Order Concerning The State Purchases Review Committee	January 5, 1995
8	FY 94/95	Governor's Board on Executive Clemency	January 27, 1995
9	FY 94/95	An Order Reestablishing The Governor's Select Committee on Judicial Appointments	February 10, 1995
10	FY 94/95	An Order Amending executive order 10 FY 91/92	March 7, 1995
11	FY 94/95	An Order Creating The Maine Council On Sustainable Forest Management	April 25, 1995
12	FY 94/95	Special Budget and Expenditure Order of 1995	May 15, 1995
13	FY 94/95	Order Establishing The Governor's Task Force On Prevention Of Adolescent Self-Destructive Behavior	May 31, 1995
1	FY 95/96	An Order Establishing The Maine Task Force On Interstate Banking And Branching	August 2, 1995
2	FY 95/96	Special Budget And Expenditure Order of October, 1995	October 17, 1995
3	FY 95/96	An Order To Establish The Maine Atlantic Salmon Task Force	October 20, 1995
4	FY 95/96	An Order to Establish the Land Acquisition Priorities Advisory Committee	January 3, 1996
5	FY 95/96	An Order Establishing the Governor's Council on Physical Fitness and Sports	January 30, 1996
6	FY 95/96	An Order Establishing The Maine Harness Racing Task Force	February 12, 1996
7	FY 95/96	An Order to Establish The Recreational Marine Fisheries Advisory Committee	March 7, 1996

8	FY 95/96	An Order to Establish the Advisory Committee on Gambling	April 3, 1996
9	FY 95/96	An Order Concerning State Grants and Contracts	April 11, 1996
10	FY 95/96	An Order Creating The Maine Task Force on Mental Health	May 20, 1996
1	FY 96/97	An Order To Achieve Greater Efficiencies In Intergovernmental Relations	October 1, 1996
2	FY 96/97	An Order Transferring Funds from Unallocated Highway Surplus Account Pursuant to 23 MRSA Section 1654	November 8, 1996
3	FY 96/97	An Order Designating The State Agencies Responsible for Water Quality Certification	December 17, 1996
4	FY 96/97	An Order to Establish the Communities for Children Partnership	January 16, 1997
5	FY 96/97	An Order Establishing the Council on Environmental Monitoring and Assessment	April 22, 1997
6	FY 96/97	An Order Revising the Maine Justice Assistance Council	May 22, 1997
7	FY 96/97	An Order Establishing The Maine Environmental Priorities Council	May 22, 1997
8	FY 96/97	An Order Establishing the State Correctional Facilities Improvement Advisory Committee	June 18, 1997
1	FY 97/98	An Order to Revise and Improve School Construction Policy	July 1, 1997

Source: Governor King's executive orders, received from Governor's Office, October 9, 1997

Attachment 2: Maine statutes related to executive orders

1. The Freedom of Access law provides that any advisory organization created by an executive order is subject to the Freedom of Access law unless the executive order specifically exempts the organization from the Act. The importance of this provision applies mainly to the provisions concerning public proceedings and public records. 1 MRSA §402, sub-§§2 and 3.
2. Current law requires the Governor to maintain a file of all executive orders, including those of previous Governors, currently in effect, and to allow public access to that file. The law also requires that the Governor file a copy of each executive order with the Legislative Council, the Law and Legislative Reference Library and every county law library, within one week of issuance. 1 MRSA §521.
3. The State Court Administrator is required to submit fiscal impact information concerning executive orders as well as proposed legislation. The fiscal statement is supposed to be included in the executive order if the Order has a fiscal effect on the judicial system. 4 MRSA § 17, sub-§17.
4. The statutes governing the organization and compensation of boards and commissions specifically excludes from its application boards and similar organizations authorized exclusively by executive order. 5 MRSA §12002, sub-§, ¶D.
5. The Retirement System statutes contain references to specific executive orders requiring lay offs and shut downs as they relate to average final compensation of state employees. 5 MRSA §17001, sub-§4.
6. The Criminal History Record Information Act recognizes that a criminal justice agency authorized to have access to otherwise-confidential information may be created by an order issued by the President or the chief executive of a state, the order of which has the force of law. 16 MRSA §611, sub-§§4 and 7. The Act also authorizes release of otherwise-confidential information to any person as authorized by an executive order. 16 MRSA §613, sub-§2.
7. The statutes concerning the funding of state mandates includes executive orders in the definition of “mandate” if the executive order requires a local unit of government to expand or modify that unit’s activity so as to necessitate additional expenditures from that unit’s local revenues. 30-A MRSA §5658, sub-§1, ¶C.

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