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The Use of Executive Orders in Wisconsin

Richard A. Champagne
chief

Madeline Kasper, MPA, MPH
legislative analyst



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One East Main Street, Suite 200, Madison, Wisconsin 53703
<http://legis.wisconsin.gov/lrb> • 608-266-3561

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The executive order is an important tool used by governors to carry out their constitutional and statutory duties. While most executive orders honor the lives and public service of Wisconsin residents or pay tribute to the military service of Wisconsin armed forces personnel who have died in combat, some have far-reaching administrative and public policy importance. For example, in the span of about a week in late October to early November 2017, Governor Scott Walker issued three executive orders dealing with core functions of state government. One executive order prohibited state agencies from executing “a contract with a business entity if that entity is engaged in a boycott of Israel.”¹ Another executive order set the date for a special election to fill a vacancy for an assembly district seat in the state legislature.² A third executive order declared an energy emergency for the entire state because of a propane shortage.³ These executive orders, issued in quick succession, point to the many uses of executive orders as a powerful legal instrument for the governor to oversee the operations of the executive branch and the general conduct of state government.

Governing and administering state government operations through executive orders raise a number of important and timely issues. What is the legal basis and status of an executive order? What is the process for issuing an executive order? How have executive orders been used? Have recent governors issued more executive orders than governors in the past? Has the scope and reach of gubernatorial executive orders expanded over time? Finally, are executive orders a more efficient and accountable way than other instruments used by governors to achieve uniform and accountable executive branch administration and operations? This report addresses these and other issues by presenting an overview of the use of executive orders by Wisconsin governors since the 1960s, focusing on the recent gubernatorial administrations of James Doyle and Scott Walker.⁴

The legal basis of executive orders

There is no mention of executive orders in the Wisconsin Constitution, and there are just scattered references to executive orders in the Wisconsin Statutes.⁵ In none of these

1. Executive Order 261 (October 27, 2017). It should be noted that each Wisconsin governor begins anew the number of executive orders, starting from Executive Order 1, unlike presidential executive orders which continue the number sequence across successive presidential administrations. Each governor issues his or her initial executive order as Executive Order 1. Thus, executive orders across gubernatorial administrations in Wisconsin are distinguished by date, not number.

2. Executive Order 262 (November 1, 2017).

3. Executive Order 263 (November 3, 2017).

4. Other papers that discuss executive orders in Wisconsin include Larry Barish, “The Use of the Executive Order by Wisconsin Governors,” *Informational Bulletin 76-IB-10* (Madison: Wisconsin Legislative Reference Bureau, December 1976); Susan B. King, “Comment, Executive Orders of the Wisconsin Governor,” *Wisconsin Law Review* (Madison: University of Wisconsin Law School, 1980), 333–65; Benjamin S. Longlet, “Comment, Gubernatorial Executive Orders in Wisconsin: The Case for Judicial Enforcement,” *Wisconsin Law Review* (Madison: University of Wisconsin Law School, 2000), 1323–44.

5. See, for example, sections 14.019 (1), 16.40 (14), 16.53 (1) (c) 7., 20.525 (1) (b), 38.40 (1), 100.305 (2), 106.12, 108.141 (1m), 108.142 (1m), 118.30 (1g) (a), 186.118, 227.10 (2m), 230.315 (3) (b), 323.10, and 340.01 (15s), Wisconsin Statutes (2015–16).

references are executive orders defined. Executive orders are best considered as directives issued by the governor that carry the force of law if based on identifiable legal authority, such as the state constitution or statutes. Although the statutes do not specify that executive orders must be issued in any certain manner or form, they do require the governor to deposit executive orders in the Office of the Secretary of State⁶ and direct the secretary of state to affix the state seal to and countersign all official acts of the governor, which in practice have always included executive orders.⁷ Thus, although there are no procedural requirements, a practice has developed for the governor to issue and sign an executive order and transmit the order to the Office of the Secretary of State and for the secretary of state to affix the state seal to and sign the executive order. The Legislative Reference Bureau publishes copies of executive orders in the Wisconsin Administrative Register.⁸ Importantly, an executive order does not require any action of either house of the legislature, any administrative hearing or proceeding or other governmental process, or any public input or judicial involvement. The decision by the governor to issue an executive order is a decision of the governor's alone.

Although there is no mandatory format for an executive order, the governor will always cite in the executive order the legal grounds or authority underpinning the order. This authority will differ depending on the executive order. Sometimes the relevant legal authority will be general law. For example, in Executive Order 235, which was issued in 2017 and dealt with establishing best practices for administering and responding to public records requests to state agencies, Governor Walker stated that he was issuing the order "by the authority vested in me by the Constitution and laws of this State."⁹ In contrast, sometimes the legal authority cited by the governor is more specific. In Executive Order 262, for instance, which called a special election for Assembly District 58, Governor Walker stated that he issued the order "pursuant to article IV, section 14 of the Wisconsin Constitution and section 8.50 of the Wisconsin Statutes."¹⁰ Article IV, section 14, of the constitution requires the governor to issue writs of election to fill vacancies in the senate and the assembly, while section 8.50, Wisconsin Statutes, establishes the process for calling and conducting special elections to fill vacancies. Let us explore the legal sources of executive orders a little more closely.

Wisconsin Constitution

The Wisconsin Constitution, at least in a general way, is the authority most often cited by

6. Section 14.09, Wisconsin Statutes (2015–16).

7. Section 14.38 (2), Wisconsin Statutes (2015–16). The statutes also provide that the secretary of state maintain a record of all executive branch acts. See section 14.38 (1), Wisconsin Statutes.

8. Section 35.93 (2) (b) 5., Wisconsin Statutes (2015–16).

9. Executive Order 235 (March 9, 2017).

10. Executive Order 264 (November 7, 2017).

the governor in executive orders. The constitution assigns specific powers and duties to the governor. The governor is commander in chief of state military forces;¹¹ is required to call elections to fill legislative vacancies;¹² must transact all necessary business with other state actors;¹³ may call the state legislature into special session,¹⁴ grant pardons,¹⁵ and fill judicial vacancies by appointment;¹⁶ and may veto bills and partially veto appropriation bills.¹⁷ If the governor performs these duties or exercises these powers through executive orders, the governor can point to a constitutional provision as the legal basis of the executive order. In contrast, there are sections in the constitution that are more general and broader in scope but that are equally important. In this regard, article V, section 1, of the constitution—the vesting clause—provides that “The executive power shall be vested in a governor,” while article V, section 4—the take care clause—provides that the governor “shall take care that the laws be faithfully executed.”

The vesting clause assigns the executive power to the governor and has counterparts in other provisions in the constitution that vest the legislative power in the legislature¹⁸ and the judicial power in the courts.¹⁹ Together, these clauses form the foundation of the separation of powers design of Wisconsin state government in which each political branch is assigned powers that cannot be exercised by other branches.²⁰ At its most basic level, the executive power is the power to carry out or enforce programs or policies adopted by the legislature—in other words, the laws.²¹ To be sure, there are powers that are not entirely within the constitutional domain of any one branch, as well as powers that are best viewed as shared powers.²² For example, the governor’s power under article V, section 10, of the constitution to partially veto appropriation bills by striking statutory text and reducing appropriation amounts made by the legislature is fundamentally a lawmaking power. With respect to shared powers, the court has developed a test that provides that one branch of government may exercise shared or overlapping powers with other branches only if the exercise of the powers does not unduly burden or substantially interfere with the other branches’ essential roles and powers.²³ An executive order based

11. Article V, section 4, Wisconsin Constitution.

12. Article IV, section 14, Wisconsin Constitution.

13. Article V, section 4, Wisconsin Constitution.

14. Article IV, section 11, Wisconsin Constitution.

15. Article V, section 6, Wisconsin Constitution.

16. Article VII, section 9, Wisconsin Constitution.

17. Article V, section 10, Wisconsin Constitution.

18. Article IV, section 1, Wisconsin Constitution.

19. Article VII, section 2, Wisconsin Constitution.

20. *Davis v. Village of Menasha*, 21 Wis. 497 (1867); *Thoe v. Chicago M&S.P.R.Co.*, 181 Wis. 456, 195 N.W. 407 (1923).

21. See section 15.001 (1), Wisconsin Statutes, for a brief statement of each branch’s core powers under a separation of powers form of government.

22. *Rules of Court Case*, 204 Wis. 501, 236 N.W. 717 (1931); *In Matter of Complaint Against Grady*, 118 Wis.2d 762, 348 N.W.2d 559 (1984).

23. *State v. Holmes*, 106 Wis.2d 31, 315 N.W.2d 703 (1982); *State ex rel. Friedrich v. Dane County Cir. Ct.*, 192 Wis.2d 1,

on the vesting clause would flow directly from the assignment of executive power to the governor and, if a shared or overlapping power, must not unduly burden or substantially interfere with the powers or duties of the legislature or the courts.

The take care clause requires the governor to faithfully execute the laws; in many ways, it augments the vesting clause. While the vesting clause grants the governor the executive power, which is the power to oversee the operations of state government, the take care clause imposes on the governor the additional and more demanding duty to *faithfully* carry out the laws.²⁴ But the take care clause is more than a constitutional duty: it can also be viewed as a separate grant of power to the governor of exclusive control over how the laws are enforced. In other words, the take care clause gives the governor sole control over the enforcement of laws, including the manner in which the laws are enforced.²⁵ For example, through the exercise of executive discretion, the governor can determine the best and most effective way to execute the laws. Therefore, an executive order dealing with the enforcement of laws, including the manner in which executive branch agencies and actors enforce the laws or carry out legislative programs and policies, would derive its legal authority from both the vesting clause and the take care clause.

Wisconsin Statutes

Statutory laws are another source of authority for the issuance of executive orders. There are state statutes that acknowledge that the governor may carry out a statutory duty or exercise a legislatively delegated power through an executive order.²⁶ For example, section 14.019 (1), Wisconsin Statutes, recognizes that the governor may create executive branch committees by executive order, while section 323.10, Wisconsin Statutes, permits the governor to declare a state of emergency by executive order. In these and other statutes, the state legislature requires or affirms that the governor may engage in an action through executive order. In this respect, the executive order is acknowledged as one of the legal means the legislature recognizes for the governor to carry out a duty imposed by law. There are also statutes that require the governor to take an action, but do not specify that the governor must do so by executive order or any other specific means. As mentioned earlier, section 8.50, Wisconsin Statutes, requires the governor to call special elections to fill vacancies in state legislative offices, but the provision does not spell out the legal

531 N.W.2d 32 (1995).

24. There is no discussion in Wisconsin case law of the interplay between the vesting clause and the take care clause, though most commentators treat each as a separate exercise of executive power. See, Susan B. King, "Comment, Executive Orders of the Wisconsin Governor," *Wisconsin Law Review* (Madison: University of Wisconsin Law School, 1980), 333–65.

25. The take care clause is modeled after an identical clause in the U.S. Constitution, article II, section 3. A good discussion of the federal provision can be found in Todd Garvey, "The Take Care Clause and Executive Discretion in the Enforcement of Law," *CRS Report* 7-5700, (Washington DC: Congressional Research Service, September 4, 2014).

26. See, for example, sections 14.019 (1), 16.40 (14), 16.53 (1) (c) 7, 20.525 (1) (b), 38.40 (1), 100.305 (2), 106.12, 108.141 (1m), 108.142 (1m), 118.30 (1g) (a), 186.118, 227.10 (2m), 230.315 (3) (b), 323.10, and 340.01 (15s), Wisconsin Statutes (2015–16).

means for doing so. Governors have traditionally called special elections, at least since the 1970s, by executive order. When calling a special session, the governor determines the appropriate legal instrument that he or she will use to carry out a duty of office.

Federal law

Federal law is the final source of authority for the issuance of executive orders, at least indirectly. Consider the following two examples. In 2015, Governor Walker issued Executive Order 152, reconstituting the Governor's Council on Workforce Investment, "pursuant to section 101 of the Workforce Innovation and Opportunity Act of 2014, codified at 29 U.S.C. § 3101 et seq., which updated membership requirements for state workforce development boards."²⁷ Although in the executive order the governor cited section 14.019, Wisconsin Statutes, which is the statute authorizing the governor to create nonstatutory committees, as the legal source for reconstituting the council, a change in federal law was the driving force for the executive order and state law was the means to achieve the change. In contrast, in Executive Order 18, issued in 2017, Governor Walker generally cited "Federal and State law" as the legal basis for his power to suspend an earlier executive order issued by Governor Doyle, which mandated the employment of apprentices on state construction projects.²⁸ In these examples, federal law was not necessarily the basis of the governor's authority to issue the executive orders, but was the justification the governor used to issue the executive orders. In this way, federal law may be identified as an indirect source for the governor's ability to issue an executive order.

From this discussion, we can conclude that a valid and legally enforceable executive order is one based on the governor's constitutional powers or duties or one issued pursuant to a lawful delegation of power from the state legislature or resulting from a condition imposed by the federal government.

A history of executive orders

For most of Wisconsin history, governors did not issue executive orders in any appreciable number. In 1976, the Legislative Reference Bureau conducted an exhaustive survey of all official acts of governors since 1947 to determine the number of executive orders issued during the 1947–65 period.²⁹ The survey found that fewer than 10 executive orders were issued by each of the five governors who served during that time, most of which were to implement legislative directives enacted into law. It was not until the gubernatorial administration of Warren Knowles during the 1965–71 period that governors began

27. Executive Order 152 (March 20, 2015).

28. Executive Order 18 (March 9, 2011). This order suspended Executive Order 108 (July 5, 2005).

29. Larry Barish, "The Use of the Executive Order by Wisconsin Governors," *Informational Bulletin 76-IB-10* (Madison: Wisconsin Legislative Reference Bureau, December 1976).

to issue executive orders with some frequency, including orders that were not expressly authorized or directed by the legislature. Governor Knowles was also the first governor to implement a formal numbering system to identify and distinguish among executive orders, inaugurating the current practice of starting anew the numbering of executive orders with the start of each new gubernatorial term of office.

Table 1 presents a summary of the executive orders issued by Wisconsin governors during the 1965–2018 period, from Warren Knowles to Scott Walker. Table 1, which lists the number of executive orders issued by each governor, documents the growing use of executive orders during the 1965–2018 period. The 49 executive orders issued by Governor Knowles during his six years as governor was about five times as many as those issued by any one of his predecessors during the preceding 1947–65 period, but was far fewer than those issued by governors who succeeded him. Governor Tommy Thompson, who

Table 1. Executive orders by governor

	Committee	Head of state	Executive	Emergencies	Special election	Special session ⁱ	Total
Knowles ⁱⁱ (R) 1965–71	17	1	15	16	0	0	49
Lucey ⁱⁱⁱ (D) 1971–79	39	1	46	46	18	0	150
Dreyfus (R) 1979–83	38	0	11	24	30	0	103
Earl (D) 1983–87	35	1	29	17	22	21	125
Thompson ^{iv} (R) 1987–2003	133	90	73	104	42	37	479
Doyle (D) 2003–11	27	199	46	48	5	11	336
Walker (R) 2011–19 ^v	22	133	36	58	15	12	276

i. Prior to 1983, special sessions were called by proclamation.

ii. This covers three terms under Knowles. Under the original Wisconsin Constitution, governors were elected for two-year terms. In 1967, the constitution was amended to increase the term of office to four years, beginning with the governor elected in the 1970 election, Patrick Lucey.

iii. Lieutenant Governor Martin J. Schreiber took over for Governor Patrick Lucey on July 6, 1977, when Lucey was appointed ambassador to Mexico.

iv. Lieutenant Governor Scott McCallum took over for Governor Tommy Thompson on February 1, 2001, when Thompson was appointed secretary of health and human services.

v. Includes executive orders issued by Governor Scott Walker through February 22, 2018.

issued 479 executive orders during his 16 years in office, issued almost 10 times as many executive orders as did Governor Knowles.³⁰ Governor Doyle issued 336 executive orders during his eight years in office, while Governor Walker issued 276 executive orders

30. We include in Governor Thompson's executive order count those issued by Governor Scott McCallum, who became governor in 2001 and served out the remainder of Thompson's last term in office when Thompson was appointed secretary of health and human services in 2001 by President George W. Bush.

during his first seven years in office. The last two governors issued an average of nearly 40 executive orders a year, a number that documents the regular and growing reliance on executive orders as an instrument of gubernatorial administration and a means for the governor to engage in official acts.

Table 2 breaks down the number of executive orders issued during each term of office, so that we can compare the number of executive orders across gubernatorial terms.³¹ Again, the numbers tell the same story. Governor Pat Lucey, during his two terms as governor during the 1971–79 period, issued three times as many executive orders as did Governor Knowles during his six years in office.³² Beginning with Governor Dreyfus, who became governor in 1979, and in every gubernatorial term thereafter, the total number of executive orders issued by governors ranges from the low- to mid-hundreds,

Table 2. Executive orders by gubernatorial term

	Committee	Head of state	Executive	Emergencies	Special election	Special session ⁱ	Total
Knowles ⁱⁱ (R) 1965–71	17	1	15	16	0	0	49
Lucey (D) 1971–75	28	1	23	28	5	0	85
Lucey ⁱⁱⁱ (D) 1975–79	11	0	23	18	13	0	65
Dreyfus (R) 1979–83	38	0	11	24	30	0	103
Earl (D) 1983–87	35	1	29	17	22	21	125
Thompson (R) 1987–91	43	0	18	19	14	14	108
Thompson (R) 1991–95	36	10	21	36	18	12	133
Thompson (R) 1995–99	21	48	17	20	7	5	118
Thompson ^{iv} (R) 1999–2003	33	32	17	29	3	6	120
Doyle (D) 2003–07	17	115	23	16	5	3	179
Doyle (D) 2007–11	10	84	23	32	0	8	157
Walker (R) 2011–15	14	62	25	27	10	9	147
Walker (R) 2015–19 ^v	8	71	11	31	5	3	129

31. Since Governor Knowles was governor when Wisconsin governors were elected only to two-year terms, we present his executive orders in one lump sum over a six-year period.

32. Governor Lucey served only until 1977 and was succeeded by Martin Schreiber when Lucey was appointed ambassador to Mexico by President Jimmy Carter.

topping out with Governor Doyle's first term total of 179 executive orders, the most any Wisconsin governor has issued during a single term in office. Therefore, the data provide a clear picture: during the 1947–65 period, as mentioned earlier, fewer than 10 executive orders were issued by each of the five governors who served during that time. During the 1965–79 period, Governors Knowles, Lucey, and Dreyfus each issued more than all of their predecessors during the 1947–65 period. But, significantly, beginning with Governor Earl and continuing to Governor Walker, every Wisconsin governor has issued more than 100 executive orders during each of his four-year terms in office. Executive orders are now a common legal instrument that governors use to make and memorialize their official acts.

While tables 1 and 2 provide a useful summary of the numbers of executive orders issued by governors during the 1965–2018 period, they also present the executive orders under specific categories. This categorization helps us to understand not only the numbers of executive orders issued by governors over time, but also the types. By focusing on categories of executive orders, we can see the continuity of certain types of executive orders over time and assess whether the increase in executive orders issued by governors is more a function of changing historical factors—that is, specific events—and less a result of the changing role of executive orders in administering state government. We can also delve more deeply into the many uses of executive orders by recent governors.

In these tables, we have assigned the executive orders to six categories, each of which deals with the subject matter or purpose of the executive orders. The categories are committee, head of state, executive, emergencies, special election, and special session.³³ The **committee** category consists of executive orders that establish nonstatutory committees, commissions, or councils to address a specific problem. Most of Wisconsin's Blue Ribbon commissions were created by executive order. Usually, governors will cite section 14.019, Wisconsin Statutes, as the legal authority for these executive orders. Nonstatutory entities are not legislative committees, are not permanent creations with full-time staff, and are created specifically to draw public attention to a pressing problem facing the state.³⁴ The **head of state** category consists mainly of executive orders that order the flags of the United States and Wisconsin to be flown at half-staff as a mark of respect for law enforcement officers who have died in the line of duty, prominent public officials who have died, men

33. Studies of executive orders in other states use different category schemes to distinguish executive orders. The ones we have used best fit the kinds of executive orders issued by Wisconsin governors. These other studies include Council of State Governments, *The Book of the States*, vol. 47 (Lexington, KY: Council of State Governments, 2017), 179–80; “Gubernatorial Executive Orders as Devices for Administrative Discretion and Control,” *Iowa Law Review* 50, no. 78 (1964): 98; E. Lee Bernick and Charles W. Wiggins, “The Governor’s Executive Order: An Unknown Power,” *State & Local Government Review* 16, no. 1 (Winter 1984): 3–10; and Margaret R. Ferguson and Cynthia J. Bowling, “Executive Orders and Administrative Control,” *Public Administration Review* 68, supplement to vol. 68: “The Winter Commission Report Revisited: 21st Century Challenges Confronting State and Local Government and How Performance Can Be Improved” (December 2008): S20–S28.

34. An example would be Executive Order 66 (August 9, 2004), issued by Governor Doyle, which established the Governor’s Inter-Agency Council on Homelessness. Another example would be Executive Order 214 (September 22, 2016), issued by Governor Walker, which established the Governor’s Task Force on Opioid Abuse.

and women who have died as a result of a national tragedy, such as the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995,³⁵ and, frequently, Wisconsin residents serving in the armed forces who have died in combat. Head of state executive orders are nonpartisan acts of great symbolic, honorific, and ceremonial importance. In these acts, the governor represents the state in extending the condolences of its residents.

The **executive** category consists of those executive orders that provide instructions or directives to executive branch agencies;³⁶ manage state agency operations or functions;³⁷ address state personnel management issues;³⁸ create, alter, or eliminate regional planning commissions;³⁹ or involve state government participation in interstate bodies.⁴⁰ In these executive orders, the governor is exercising powers that derive directly from the vesting clause. The hallmark of these executive orders is that they provide uniformity to executive branch operations and allow the governor to target executive branch resources at a common problem facing the state. These executive orders deal with the operations, staffing, and programs of state government. Similarly, the **emergencies** category consists of executive orders in which the governor declares a state of emergency because of, among other things, energy shortages, highway issues, weather, public health, missing persons, and generally instances in which the Wisconsin National Guard is activated. In these executive orders, the governor marshals state government assets to deal with an unexpected crisis. These are decisive executive actions, involving the rapid mobilization and deployment of state government resources and personnel.

The final two categories—**special elections** and **special sessions**—include executive orders in which the governor calls a special election to fill a vacancy in an elective office or calls the legislature into special session. As mentioned earlier, the governor calls special elections pursuant to the constitution and the statutes. Article IV, section 14, of the constitution requires the governor to issue writs of election to fill vacancies in the senate and the assembly, while section 8.50, Wisconsin Statutes, establishes the process for calling and conducting special elections to fill vacancies. Interestingly, the practice of calling special elections by executive order started first in 1971.⁴¹ The governor's power to call the legislature into special session also derives from the constitution, but governors have

35. Executive Order 248 (April 20, 1995).

36. An example would be Executive Order 5 (January 14, 2011), issued by Governor Walker, which instructed cabinet secretaries to meet with state workers to find more efficient ways to provide services.

37. An example would be Executive Order 28 (October 25, 1983), issued by Governor Earl, which required the Department of Employment Relations to administer a comprehensive and coordinated statewide service delivery and equal employment opportunity program and mandated that state agency heads comply with the program.

38. An example would be Executive Order 35 (February 5, 1988), issued by Governor Thompson, which created an Employee Assistance Program.

39. An example would be Executive Order 52 (August 22, 2002), issued by Governor McCallum, which abolished the Dane County Regional Planning Commission.

40. An example would be Executive Order 21 (August 31, 1987), issued by Governor Thompson, which directed the Department of Revenue to withdraw from the Great Lakes Interstate Sales Compact.

41. Governor Lucey issued the first executive order calling for a special election. See Executive Order 4 (January 28, 1971).

done this by executive order only since 1983.⁴² Therefore, in looking at executive orders during the 1965–2018 period, it is important to remember that some official acts were not always done by executive order.

In looking at tables 1 and 2, the first noticeable trend is the dramatic increase in the number of executive orders in the head of state category. For the most part, governors did not issue executive orders in this category until Governor Thompson's second term in office during the 1991–95 period. Before this time, governors certainly honored the lives and public service of Wisconsin residents, but they did not do so through executive orders. Rather, governors issued proclamations to honor the lives and public service of Wisconsin residents. During the second Thompson administration, this practice changed. Most of Governor Thompson's head of state executive orders honored peace officers and fire fighters who died in the line of duty or commemorated the deaths of prominent public officials. But during the last two years of Governor Thompson's fourth term, and continuing into Governor Walker's administration, executive orders in the head of state category were increasingly used to honor the lives of Wisconsin men and women who died in combat in Iraq or Afghanistan. In fact, almost two-thirds of Governor Doyle's executive orders, and almost half of those issued by Governor Walker, were in the head of state category. This category alone counts for almost all of the increase in the number of executive orders issued in the 2003–18 period as compared to those issued in the 1965–79 period.

The second noticeable trend is the marked decrease in the number of executive orders under the committee category. During the 1979–2003 period, between 30 and 40 percent of the executive orders issued by governors were in the committee category. This was the most important use of executive orders during this period and were a means to set the governor's agenda. During the Doyle and Walker administrations, however, that percentage fell to less than 10 percent. In absolute terms, Governor Walker, in his second term, issued only eight executive orders, which is the fewest number of executive orders in the committee category than any governor in the 1965–2018 period. There are many reasons for this decrease. Governors now have many ways to publicize issues and mobilize state government resources to address the issues. For example, press releases and press conferences are one way the governor can bring public attention to a problem. Governors can quickly travel across the state to rally and garner support for their public policy agendas. Significantly, the Internet and increased reliance on social media by political leaders have changed the ways in which governors communicate with the electorate, allowing for near constant contact with the public. The result is that creating a committee by executive order to highlight and address a problem facing the state may no longer be the most effective means of achieving these goals.

42. Article IV, section 11, Wisconsin Constitution. Governor Earl issued the first executive order calling the legislature into special session. See Executive Order 32 (October 17, 1983).

Tables 1 and 2 also show a lack of any pattern over time in the number of executive orders issued in the emergency, special election, and special session categories. There are good reasons for this. Governors issue emergency and special election executive orders in response to specific events that are outside their control: governors call special elections only if there are vacancies to be filled and they declare emergencies only in the event of natural disasters or other calamities. We may therefore expect the number of these kinds of executive orders to vary over time depending on outside events. With a few exceptions, recent governors have issued executive orders declaring state emergencies in numbers from the mid-20s to lower-30s. In terms of special sessions, there is also no discernable trend. Governor Earl issued 21 executive orders calling or supplementing special sessions of the legislature during his four-year term in office, the most of any governor in one term. In contrast, Governor Doyle did not issue a single executive order calling a special session during his second term in office.⁴³

Finally, the number of executive orders assigned to the executive category is fairly constant over time, numbering per gubernatorial term mostly in the teens and twenties. But beneath the numbers is another story. In looking at the executive orders, there has been a trend over time for executive orders in the executive category to increasingly address issues involving executive branch organization, staffing, and operations. Consider the executive orders in this category during the 1965–2018 period. During Governor Knowles’s three terms in office, from 1965 to 1971, other than an executive order giving the Industrial Commission sole authority to administer certain job training programs,⁴⁴ most of his executive orders dealt with the creation of regional planning commissions or implementation of federal programs. He did not issue executive orders to coordinate state agency operations or programs or to ensure uniformity to executive branch actions. During Governor Lucey’s term, his most consequential executive order was one establishing an affirmative action unit in the State Bureau of Personnel to review state agency affirmative action programs and oversee implementation of affirmative action programs.⁴⁵ This was a far-reaching order, especially for its time. But, like the executive orders of Governor Knowles, most of Governor Lucey’s orders were focused on regional commissions, the implementation of federal programs, and relatively minor state agency operations.

During Governor Earl’s administration, the focus of these kinds of executive orders began to change, albeit in modest ways. Governor Earl issued 29 executive orders in the executive category, the most issued during any gubernatorial term. His executive orders were limited in scope, but some addressed issues involving the administration

43. Special sessions were not called by executive order before 1983. During the 1965–82 period, governors called 20 special sessions of the legislature. For an informative discussion of special sessions in Wisconsin, see Madeline Kasper and Michael Keane, “What is a Special Session?” *LRB Reports* 1, no. 3 (Madison: Wisconsin Legislative Reference Bureau, March 2017).

44. Executive Order 1 (January 31, 1966).

45. Executive Order 39 (May 17, 1972).

and operations of state agencies. One executive order prohibited state agencies from meeting in private facilities that practiced discrimination.⁴⁶ Another required the Department of Employment Relations to administer and implement a comprehensive and coordinated statewide service delivery and equal employment opportunity program.⁴⁷ A different executive order directed the secretary of administration to facilitate a statewide dispute mediation through a pilot mediation project,⁴⁸ while another required all executive branch agencies to use minority underwriters and financial advisors.⁴⁹ Individually, each of these executive orders was limited in scope; collectively, they shared the presumption that the governor should allocate state government resources and coordinate state agency operations via executive orders. There also was recognition that uniformity in executive branch actions could be achieved or fostered through executive orders.

Governor Thompson issued more executive orders in the executive category than any other governor, but that is largely due to his serving nearly four terms in office. For the most part, his executive orders did not address administration operations, staffing, and programs, but instead directed state agencies, like the Department of Veterans Affairs, to take actions to implement federal programs.⁵⁰ There were a few exceptions. One executive order directed the Public Service Commission to fund and provide voicemail service for the homeless,⁵¹ while another executive order transferred certain higher education grant programs to the Department of Administration.⁵² Other executive orders required executive branch agencies to develop and promulgate written health and safety programs⁵³ and directed the Department of Administration to develop and implement an enterprise approach for the state's information technology infrastructure.⁵⁴ Although these executive orders addressed executive branch operations and programs, most of Governor Thompson's executive orders did not deal with administrative matters or attempt to achieve uniformity in state agency actions. This does not mean that Governor Thompson was unconcerned with agency operations, programs, and staffing during his years in office; it merely shows that he did not pursue these activities through executive orders. Instead, Governor Thompson actively used the lawmaking process to achieve his far-reaching executive branch reorganizations and administrative reforms, primarily

46. Executive Order 24 (August 26, 1983).

47. Executive Order 28 (October 25, 1983).

48. Executive Order 67 (November 19, 1984).

49. Executive Order 92 (February 20, 1986).

50. In fact, 18 of Governor Thompson's 73 executive orders in the executive category directed the Department of Veterans Affairs to take actions to comply with federal law requirements for issuing bonds.

51. Executive Order 21 (August 17, 2001). This order was actually issued by Governor Scott McCallum during his brief tenure as governor after Governor Thompson left office.

52. Executive Order 283 (June 9, 1996).

53. Executive Order 194 (July 30, 1993).

54. Executive Order 242 (February 1, 1995).

through his executive budget bills.⁵⁵ Legislation, not the executive order, was the primary means for achieving executive branch reform and uniformity of action during the Thompson administrations.

Executive orders issued by Governors Doyle and Walker were for the most part like those issued by their predecessors, such as directing the Department of Veterans Affairs to take actions to comply with federal law,⁵⁶ creating regional planning commissions,⁵⁷ and closing state government offices because of adverse weather conditions.⁵⁸ But there were a number of orders issued by these governors that highlight the potential scope and reach of executive orders as a legal means for governors to implement policy goals without calling on the legislature to enact laws and provide uniform executive branch administration of programs. Consider Governor Doyle's Executive Order 285.⁵⁹ This executive order, issued during the Great Recession, ordered a 16-day unpaid furlough for all state employees and directed state agencies to close on certain days. In the executive order, the governor cited his constitutional powers and statutory authority deriving from a few civil service laws relating to length of work day and closing of state offices during an emergency. This executive order was unprecedented in scope, reducing state government expenditures by over \$192,000,000.⁶⁰ That the governor could impose salary reductions for tens of thousands of state employees by the stroke of a pen, without legislation, reveals the potential of executive orders to alter state government operations.

Other Governor Doyle executive orders created smoke-free state office buildings,⁶¹ directed state agencies to take measures to conserve energy,⁶² required the Department of Commerce to invest in stem cell technology and business startups,⁶³ mandated the use of evaluation committees for state procurement contracts across all executive branch agencies,⁶⁴ and limited the discretion the Department of Natural Resources could exercise over the administration of piers and wharfs.⁶⁵ These executive orders aimed at achieving uniformity in state agency operations and at aligning the administration of agency programs with the governor's policy preferences. To be sure, most of these executive orders were

55. During most of Governor Thompson's years in office, specifically for the 1989–2002 period, the Legislative Reference Bureau regularly compiled a list of executive branch entities that were created, eliminated, or modified by enactments. During this time, the number of such entities created, eliminated, or modified totaled 469. For comparison's sake, during the Governor Doyle administrations, a period of eight years, the total number was just 147. This information is available for review at the offices of the Legislative Reference Bureau.

56. Ten of Governor Doyle's 46 executive orders in the executive category dealt with the Department of Veterans Affairs.

57. Executive Order 197 (May 2, 2007).

58. See, for example, Executive Order 307 (December 9, 2009) and Executive Order 12 (February 1, 2011).

59. Executive Order 285 (June 23, 2009).

60. Richard A. Champagne, "The Executive Order," *Governing Wisconsin*, no. 34 (Madison: Wisconsin Legislative Reference Bureau, January 2012).

61. Executive Order 89 (February 4, 2005).

62. Executive Order 132 (November 21, 2005).

63. Executive Order 147 (April 25, 2006).

64. Executive Order 137 (February 2, 2006).

65. Executive Order 148 (May 8, 2006).

fairly limited in scope, but they showed the possibilities for using executive orders to give the governor more control over the day-to-day operations of executive branch agencies.

Governor Walker's executive orders have continued in this vein. Soon after taking office, Governor Walker issued Executive Order 2, creating the Commission on Waste, Fraud and Abuse,⁶⁶ and followed up with an order requiring each head of a state agency to create a team to work with the commission to identify waste, fraud, and abuse in the agency.⁶⁷ Later in 2011, after enactment of 2011 Wisconsin Act 21, which substantially revised the administrative rule-making process, as well as required that the governor sign off on a state agency's statement of scope before it could promulgate a rule, Governor Walker issued what may well be the most comprehensive executive order of any governor.⁶⁸ The order, consisting of 11 pages of dense provisions, created the Office of Regulatory Compliance, specified how state agencies are to promulgate rules, and provided that state agencies must follow the procedures in the executive order. Never had a governor directed this kind of control over the rule-making process, nor had this degree of uniformity ever been prescribed for a core state agency operation.

Governor Walker has issued executive orders that focus on state agency operations and uniformity of administration operations. One order required state agencies to create the "Lean Government" initiative "to eliminate waste, save time, standardize workflow, and decrease process complexity" and to implement changes in agency processes and operations identified through this initiative that did not require statutory or rules changes.⁶⁹ Under the executive order, agencies were to identify best practices and implement them. Another executive order aimed at standardizing how agencies respond to and process public records requests, requiring uniform agency procedures and standards, and mandating that each state agency create a "dashboard" for the public to gauge how responsive the state agency is in processing public records requests.⁷⁰ Still another executive order created the Office of the Inspector General in the Department of Transportation, directed the inspector general to investigate and identify waste, fraud, and abuse in DOT, and required the inspector general to advise the secretary of transportation and the governor on ways to increase efficiencies and cost savings in transportation programs.⁷¹ Together, all of these executive orders point to a coordinated effort by Governor Walker to provide uniformity and accountability to executive branch agency operations and practices. These executive orders provide increased uniformity in the administrative rule-making

66. Executive Order 2 (January 3, 2011).

67. Executive Order 7 (January 24, 2011).

68. Executive Order 50 (November 2, 2011). 2011 Wisconsin Act 21 explicitly acknowledged that "The governor, by executive order, may prescribe guidelines to ensure rules are promulgated in compliance with this subchapter." See, section 227.10 (2m), Wisconsin Statutes.

69. Executive Order 66 (May 2, 2012).

70. Executive Order 189 (March 11, 2016).

71. Executive Order 255 (September 21, 2017).

process, prescribe efficiency measures that state agencies should implement in their operations and programs, set out a common procedure for state agencies to respond to public records requests, and establish a precedent for the governor by executive order to create offices of inspectors general across state agencies to advise the governor.

The use and future of executive orders

Executive orders are directives issued by the governor based on the governor's constitutional or statutory power and have the force of law. Executive orders serve many functions and purposes, ranging from honoring the lives of Wisconsin residents, to slashing hundreds of millions of dollars in state government spending, to overseeing the day-to-day operations and programs of state agencies. The use of executive orders has increased during the 1965–2018 period. Most of this increased use stems from factors beyond the control of governors, such as emergencies, vacancies in elective offices, and the increased number of Wisconsin men and women who have died in combat. The use of these kinds of executive orders will vary over time, depending on events in the state and the larger world. But the most significant transformation in the use of executive orders during this period has been in the executive category. Increasingly, Wisconsin governors have issued executive orders to establish standards and provide uniformity to executive agency operations and programs.

The executive orders of Governors Doyle and Walker point to what could be the future of executive orders in Wisconsin. Because state law requires the governor to prepare an executive budget bill,⁷² and because the constitution allows the governor to call the legislature into special session, the governor has the ability to pursue a legislative agenda. However, the use of executive orders to efficiently govern and administer state agencies, and to provide uniformity to executive agency actions, provides the governor with a tool that does not require legislation. The result is that if the governor is unable to achieve administrative efficiencies or uniformity of executive branch agencies through legislation, the governor may try to accomplish these things through executive orders. As head of the executive branch, the governor is responsible and accountable for executive branch actions. If the governor believes that immediate action is required to address state agency operations, it may be faster and more efficient for the governor to resolve the problem through executive order. The lawmaking process can be slower and more cumbersome than the governor's sole decision to issue an executive order. Executive orders may also increase governor accountability.

The challenge for future governors and legislatures is to determine the precise boundaries for when administrative control and state agency governance require legislation

72. Sections 16.45 and 16.47 (1), Wisconsin Statutes (2015–16).

and when the governor should be permitted a range of autonomy to shape and bring uniformity to state agencies. State agencies are creatures of law, with their powers and duties defined entirely by law. However, the legislature cannot address every issue or mandate every procedure affecting state agencies or regulate the day-to-day operations of state agencies. Gaps in administering programs must be filled, and executive orders are an effective means to fill the gaps. Governor Doyle's executive order imposing a 16-day furlough for state employees is the most consequential executive order in terms of dollar effects. Governor Walker's order creating the Office of Regulatory Compliance and providing for uniform and mandatory guidelines for state agencies to follow in the administrative rule-making process may be the most consequential in terms of governing. These two executive orders show the potential of executive orders as governing tools in Wisconsin. ■