

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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February 19, 2021

The Honorable Pat Woods
New Mexico State Senate District 7
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Re: Opinion Request – Governor’s authority to order state flags be flown at half-staff

Dear Senator Woods:

You have requested an Attorney General opinion regarding the specific circumstances under which the Governor may order that the New Mexico flag be flown at half-staff and whether a governor has legal authority to order that flags be flown at half-staff to acknowledge and draw awareness to the persistence of societal issues.¹ Based on our examination of the relevant constitutional, statutory, and case law authorities, as well as the information available to us at this time, we conclude that the Governor likely has authority to regulate the flying of the New Mexico state flag within the executive department and at state buildings and land falling within the authority of the General Services Department.

Further, acknowledging the potential that a governor may infer the authority to order the New Mexico state flag be flown at half-staff from other legislation, this opinion addresses two important limits on this authority. First, particular uses of flags fall within the realm of free expression and a governor’s authority to regulate such uses of the state flag by private citizens would be limited by the First Amendment of the U.S. Constitution. Second, the New Mexico State Legislature has expressly granted regulatory authority to municipalities over the regulation of flags within their external boundaries.²

¹ Texas v. Johnson, 491 U.S. 397 (1989) (burning the U.S. flag in protest); Cogine v. Crivitz, 947 F.Supp.2d 963 (2013) (flying the U.S. flag upside-down); for a non-use, see West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943) (choosing not to stand and salute the U.S. flag in public schools).

² By Executive Order 2020-031, the Governor ordered “all state flags” be flown at half-staff from May 22 to May 25, 2020 to honor those lost due to the COVID-19 pandemic. While the Governor likely did not

As a preliminary matter, the New Mexico constitution vests the Governor with the supreme power of the state and directs the Governor to take care that the laws be faithfully executed. N.M. Const. art. V, § 4. However, as head of the executive branch, the Governor's powers are limited to those granted by the constitution or statute. See N.M. Const. art. III, § 1; *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, 36 N.M. 151; *See also State ex rel. Clark v. Johnson*, 1995-NMSC-048 ¶43, 120 N.M. 562 (“The authority of [the] state executive acting pursuant to legislative grant of authority is limited to express or implied terms of that grant.”). Before delving further into our analysis, we note that while there currently is no express constitutional or legislative grant of authority to the Governor to order that the New Mexico state flag be flown at half-staff, there are two narrow grants of authority to executive departments to regulate certain aspects of flag flying.

In the first instance, the legislature has granted statutory authority to the New Mexico Public Education Department to regulate the flying of the United States and New Mexico flag in public school buildings. *See* NMSA 1978, § 22-2-9 (“The flag of the United States and the flag of the State of New Mexico shall be displayed in each classroom and on or within all public-school buildings of this state according to the regulations adopted by the state board department.”).

Additionally, there is a broad grant of authority to the General Services Department over the operations of state property, which may provide the Governor implied authority over the regulation of flags on state property and in state buildings. *See* Property Control Act, NMSA 1978, § 15-3B-1; NMSA 1978, § 15-3B-2 (defining the jurisdiction of the General Services Department which includes “all state buildings and land” except those under the jurisdiction of other executive branches);³ NMSA 1978, § 15-3B-3 (“The ‘facilities management division’ is created within the department. The director shall be appointed by the secretary [of the General Services Department] with the Governor's consent.”); NMSA 1978, § 15-3B-4(A) (“The division shall: . . . (2) regulate the use or occupancy of buildings and real property under its jurisdiction . . . (7) make rules for the conduct of all persons in and about buildings and grounds under its jurisdiction necessary and proper for the safety, care and preservation of the buildings and grounds and for the safety and convenience of the persons while they are in and about the buildings and grounds.”).

Beyond that, the authority to regulate the use of the New Mexico state flag has not been thoroughly developed by the legislature. Thus, the potential exercise of such authority over entities and individuals outside the executive branch and its jurisdiction is uncertain. For this reason, the remainder of this opinion will address two areas that may implicate the Governor's authority to regulate the flying of the New Mexico state flag outside the express jurisdiction of the executive department.

intend EO 2020-031 to apply literally to all state flags (meaning even those flown by private citizens) the order's intended application is vague. Therefore, this opinion will address the extent of the Governor's authority regarding the broadest interpretation of the order.

³ The two exceptions to this jurisdiction that may limit a governor's authority are those state buildings and land which fall under the authority of the judicial and legislative branches.

First, the Governor does not have the authority to regulate the flying of state flags by private citizens and/or private entities.⁴ In 1989, the U.S. Supreme Court held in *Texas v. Johnson* that burning the U.S. flag for purposes of protest is expressive conduct “sufficiently imbued with elements of communication,” to implicate the First Amendment.” 491 U.S. 397, 406 (1989) (quoting *Spence v. State of Washington*, 418 U.S. 405, 409 (1974)). In 1990, the Supreme Court went further and invalidated as unconstitutional the Flag Protection Act which prohibited the burning of the U.S. flag. *See U.S. v. Eichman*, 496 U.S. 310 (1990); *see also* 18 U.S.C. § 700. Additionally, flag burning is not the only conduct involving flags which is protected under the First Amendment. *See Spence*, 418 U.S. at 410 (“In many of their uses flags are a form of symbolism comprising a ‘primitive but effective way of communicating ideas ...,’ and ‘a short cut from mind to mind.’”) (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943)). Flying a flag upside-down is also considered protected speech. *See Cogine v. Crivitz*, 947 F.Supp.2d 963 (2013) (holding that an officer’s removal of an upside-down flag violated the flag owner’s First and Fourth Amendment rights). Thus, it is well-established that the manner in which private citizens use flags is protected conduct under the First Amendment.

Further, First Amendment protections are most commonly invoked against government censorship, but can also be used to protect against the government from compelling speech. For example, in *Barnette*, the Supreme Court held a regulation unconstitutional which required that children in public schools salute the flag and recite the pledge of allegiance. 319 U.S. 624 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

More recently in *Wooley v. Maynard*, the Supreme Court held that state officials could not punish a man who covered up the New Hampshire state motto on his license plate. 430 U.S. 705 (1977). The Court reasoned that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.* at 714 (quoting *Barnette*, at 637).

The private decision whether to fly a flag at half-staff would likely fall firmly within the scope of First Amendment protections. Thus, regardless of how the Governor may choose to legally justify future exercises of authority over the flying of the New Mexico state flag, there are established limits to such authority in regards to private conduct.

Second, the legislature has conferred certain limited authority to New Mexico municipalities to regulate flags within their respective jurisdictions. *See* N. M. S. A. 1978, § 3-49-1(K) (“A municipality may . . . regulate and prohibit the flying of banners, flags or signs across the streets or from houses . . .”). This legislative grant of authority to municipalities is certainly limited and may not encompass local ordinances mandating flying the state flag at half-staff, but because the Governor lacks an express grant of

⁴ If the Governor had chosen to enforce EO 2020-031 against private citizens, the order would likely be found unconstitutional. Although EO 2020-031 is not the same as a “flag desecration” statute, our Supreme Court’s opinions on such statutes are helpful.

authority from the legislature to regulate flag flying within municipalities, the Governor's authority may be limited in this regard, as municipalities "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. CONST. art. 10, § 6(D). Further, the New Mexico constitution provides for "maximum local self-government" and states that "[a] liberal construction shall be given to the powers of municipalities." *Id.* at § 6(E). And, in New Mexico, "a home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act." *Apodaca v. Wilson*, 86 N.M. 516, 521 (1974). This is a clear distinction from the constitutional provisions speaking to the extent of the Governor's powers.

As a final matter, you have requested an opinion on whether the Governor has legal authority to order that flags be flown at half-staff *to acknowledge and draw awareness to the persistence of societal issues*. As stated previously, "the authority of the state executive acting pursuant to legislative grant of authority is limited to express or implied terms of that grant." *Johnson*, 1995-NMSC-048 ¶43. There are no express grants of authority to the Governor by the New Mexico Legislature to order state flags be flown at half-staff to acknowledge the persistence of societal issues. Thus, the remaining question is whether an implied grant may exist.

The executive department consists of statutorily created departments, headed by secretaries, who serve at the pleasure of the Governor. *See* NMSA 1978, § 9-1-4. A "secretary is responsible to the Governor for the operation of the department [and] [i]t is [the secretary's] duty to manage all operations of the department . . .". Primary effect should be given to the plain meaning of departmental operations and, as shown previously, the management of facilities operations has been expressly granted by the legislature. *See* NMSA 1978, § 15-3B-3, -4(A). Further, without the expressed exemption of authority to manage departmental operations for particular purposes (such as for raising awareness of societal issues), it could be inferred from the broad operational authority granted by the legislature that the Governor may order the state flag be flown at half-staff for such purposes so long as the order is limited to the executive's jurisdictional reach. However, the broad purpose of raising awareness for societal issues suggests effects that reach beyond the executive department. Although relative to the powers of executive secretaries, New Mexico law states a "secretary may make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department[,] . . . [but] no regulation affecting any person or agency outside the department shall be adopted, amended or repealed without a public hearing on the proposed action . . ." NMSA 1978, § 9-1-5(E).

Rules and regulations are legally distinct from executive orders, but the legislative inference here regarding executive rulemaking is significant in that the legislature contemplated the implementation of executive acts which may affect parties outside the executive department. In contemplating such rulemaking, the legislature has prescribed specific procedures in which such rules are to be made into law. The issue of whether an order requiring state flags be flown at half-staff to raise awareness for societal issues would be considered to have an effect on parties outside the executive department could be

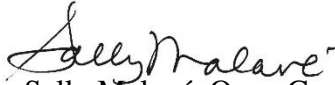
faithfully debated either way. Therefore, the authority to order state flags be flown at half-staff may be inferred by the broad legislative grant of managerial authority within the executive department. However, when such authority is exercised for the broader context of raising awareness for societal issues statewide, the executive authority may very likely be limited without some expressed grant or significant implication of the authority to do so.

CONCLUSION

The extent of the Governor's powers to order the state flag be flown at half-staff is likely limited to the executive department and state buildings and land which fall within the jurisdiction of the executive department. Lastly, acknowledging the potential for the executive to ground an implied grant of authority to order the state flag be flown at half-staff in some state law, there are two important limits to this potential exercise of power. First, the First Amendment of the U.S. Constitution limits the Governor from ordering private individuals and entities to fly their state flags at half-staff which would infringe upon the right of free speech. Second, New Mexico municipalities have some limited grants of authority to regulate the flying of flags within their jurisdiction.

Please be advised that this opinion is a public record, not subject to the attorney-client privilege. As such, we may provide copies to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please do not hesitate to contact our office.

Sincerely,



Sally Malavé, Open Government Division Director
Riley Norris, UNM 3L