



Call For Papers

RESPONDING TO EMERGENCY: A BLUEPRINT FOR LIBERTY IN A TIME OF CRISIS

Pacific Legal Foundation's Center for the Separation of Powers and New York University School of Law's *Journal of Law & Liberty* seek papers for a symposium on "Responding to Emergency: A Blueprint for Liberty in a Time of Crisis," to be held in February of 2022 at the NYU Law campus in New York City.

The COVID-19 pandemic prompted varied responses from legislative bodies and executive branch actors at every level of government, all of which has affected almost every aspect of American society. At the federal level, Congress set policy through legislation on diverse matters ranging from employment and federal housing issues to various economic relief packages. In 2020, the Trump administration took a relatively laissez-faire approach, compared to its executive branch counterparts at the state level. Notably, governors throughout most of the country took unprecedented actions aimed at slowing the spread of the disease, with many continuing to exercise "emergency powers" into 2021—generally without complying with the constitutional and procedural requirements applicable for executive branch action in ordinary times.

Debates about the nature and scope of emergency powers arose almost immediately and continue in the nation's courtrooms and legislative chambers, and the importance of that debate goes well beyond the COVID-19 pandemic. Politicians and policy activists are increasingly citing recent experiences to argue for the exercise of emergency power to address other claimed emergencies, such as climate change, systemic racism, opioid abuse, border violations, and gun violence.

We are seeking papers up to 35 pages long addressing either or both of two main areas of inquiry:

1. Substantive Legal Issues and Legal Challenges

Commenting specifically on the exercise of emergency powers at the state level, Justice Samuel Alito prompted criticism last November with his provocative comment: "The pandemic has resulted in previously unimaginable restrictions on individual liberty." Stay-at-home orders, business closures, travel restrictions, limitations on religious services, eviction moratoriums, and various other executive and legislative actions unquestionably raise significant constitutional issues and renewed questions as to the appropriate role for government in confronting conditions that threaten public health, safety, or property—

especially where such conditions may continue for an indefinite duration. This area of inquiry includes the type of legal challenges that may be brought, the proper standards of review for each, and related issues involving how courts should resolve cases that consider the infringements of individual rights.

2. Administrative Process and Democratic Accountability

In early 2021, several state legislatures took up emergency powers reforms that focused on separation-of-powers safeguards to improve democratic accountability for what had been extended unilateral action by executive branch actors. A handful of states enacted such reforms (sometimes over a governor's veto) or passed language for constitutional amendments subject to later voter approval. Many reform proposals (whether enacted this year or not) would limit the duration of executive emergency powers without legislative approval, prevent successive executive orders if any expired, and enhance legislative involvement in an extended "emergency" or chronic problem. Other reforms limit the exercise of local emergency powers or subject them to local legislative review. Still others instruct the courts to expedite judicial review of emergency order challenges and subject them to strict scrutiny review. Ongoing litigation by some governors, such as in Kentucky, informs this debate over the separation of powers.

Potential Paper Topics

This Call for Papers seeks contributions addressing the limits of executive power in confronting a continuing emergency, the proper role of legislatures in responding to future emergencies, and the degree to which courts should scrutinize either legislative or executive action during an emergency. We would like papers that address these topics from numerous perspectives, including:

1. What is the proper role of government during an extended emergency, such as the COVID-19 pandemic, and what are the limits of the state's police power to address it? Does recent experience suggest that many actions taken in 2020 (other than relaxing regulations) were not only not necessary but arguably made matters worse?
2. Which, if any, legislative grants of emergency powers to the executive branch violate [state/federal] nondelegation principles because they are so open-ended that they amount to an impermissible delegation of legislative power? What limits on such power—substantive, temporal, or procedural—render such grants permissible
3. Consideration of whether emergency orders issued by the executive branch should be subject to a more deferential standard of review than legislatively imposed restrictions.
4. What standards should courts apply in evaluating emergency orders that arguably violate/burden constitutional rights? Have lockdowns shown that some rights (e.g., property rights; the right to earn a living) should be seen as "fundamental," and thus restrictions on those rights should garner strict(er) scrutiny?
5. What role should legislatures play—in the interests of ensuring democratic accountability, transparency, and other liberal democratic norms—in establishing or reviewing state policy when an emergency extends beyond a few weeks?
6. What constitutes an "emergency" that justifies executive orders that restrict constitutional rights, and what constitutes a chronic problem that is amenable to legislative deliberation and policy formation?

7. Do the preferred incentives for public law or regulation change over the duration of a supposed emergency? What does public choice or game theory have to teach about creating the right incentives for public decision-making in crises?

Proposal Submission Details

Please submit a brief proposal no longer than 300 words that describes your thesis and how your paper will contribute to the legal discussion of emergency powers. Proposals should be submitted by August 1, 2021, to Elizabeth Slattery at ESlattery@pacificlegal.org. Early proposal submission is encouraged. Proposals will be reviewed on a rolling basis, and approvals will allow authors to begin work early.

Honorarium and Other Support

Authors of accepted papers will receive a \$3,000 honorarium. In addition, papers will be presented at a symposium in February of 2022 and published in a special issue of New York University School of Law’s *Journal of Law & Liberty*. We will cover the cost of hotel accommodations and reasonable travel expenses to the symposium in New York City.

Final Paper Submission Details

There is a 35-page limit on papers. Draft submissions are due December 1, 2021, so that we may circulate them to panelists in advance of the symposium. Authors may revise their papers following the symposium, with final submissions due within two weeks after the symposium in order to be published in the *Journal of Law & Liberty*’s special issue.

Timeline

2021		2022		
August 1	December 1	Early February	Mid-February	Spring
<p>Submission deadline for paper proposals. Proposals will be reviewed on a rolling basis. Authors are encouraged to apply early.</p>	<p>Deadline for draft papers, to be circulate to symposium participants.</p>	<p>Presentation of papers at a law symposium at New York University School of Law.</p>	<p>Deadline for paper revisions.</p>	<p>Copyedit review and publication of final papers in a special edition of New York University School of Law’s <i>Journal of Law & Liberty</i>.</p>

Contact Information

For questions regarding the call for papers, please contact Elizabeth Slattery at ESlattery@pacificlegal.org.