



PRINCIPLED LIMITATIONS ON EXECUTIVE EMERGENCY POWERS

THE PROBLEM: ABUSIVE EMERGENCY ORDERS WITHOUT RECOURSE

This year, 316 million Americans across 42 states lived under stay-at-home orders in response to COVID-19.¹ Unemployment skyrocketed because of business closures (it's improved some, but further gains may be slow). Parents and children across the country continue to struggle to adjust to virtual school. Travel is restricted. Nearly every aspect of life has changed. And most of these restrictions were imposed unilaterally by a state or local executive.

The formation of such extreme limits on individual freedom should not be left to executive officers alone. The public and our legislative leaders should be fully engaged, especially as more time passes from the initial emergency declarations. Yet, for the most part, the relevant debates have not happened in state legislative chambers. The state's police power primarily resides in state legislatures, and the authority to make or change law exclusively resides with state legislatures, but the states' most deliberative bodies have either wrongly acquiesced responsibility or have been effectively shut out of the conversation.

Although emergencies may require swift responses from an executive official, such as a governor or department head, time allows legislators to become informed and fulfill their constitutional duty as the people's representatives who make law. The COVID-19 emergency is going into its seventh month, and legislatures have had ample time to form a response.

Many courts have likewise been reluctant to intercede during the ongoing emergency. Usually when the government restricts a constitutional right, courts apply a heightened level of scrutiny, and they do so on an expedited basis if the injury is irreparable. However, during times of emergency, some courts have allowed government more leeway to restrict fundamental rights.

Yet the rule of law and its separation of powers is even more vital in times of emergency.

RECOMMENDATION SUMMARY

1. Require emergency orders to be narrowly tailored.
2. Subject emergency orders to expedited judicial review.
3. Only governor may issue a statewide emergency order that infringes constitutional rights.
4. Sunset emergency orders in seven days if the legislature is not in session or called into session.
5. Sunset emergency orders in 30 days if the legislature does not ratify the order.
6. Allow remote participation for legislators to debate and vote on emergency orders.
7. Prohibit governors from reissuing emergency orders that expired or the legislature rejected.

PRINCIPLED REFORM: RESTORING THE SEPARATION OF POWERS

Pacific Legal Foundation (PLF) is a national leader in restoring constitutional government and the separation of powers at the state and federal levels. PLF is challenging many state emergency orders in the courts and securing relief for clients from administrative agencies and officials. As important as specific relief is from overbroad orders, long-term legislative reform is even more important to ensure proper constitutional protections going forward.

The following legislative recommendations do not alter any substantive power state and local executives have to take swift action when an emergency first arises, but they enhance the authority of the other two branches to review those actions and potentially check them. These recommendations serve as a backstop to unfettered executive emergency powers and seek to restore the constitutional role of each branch of government. A model bill that can be adapted to fit the needs of each state is attached.

1. Recommendation: Require the use of emergency powers by state or local officials to be narrowly tailored to serve a compelling health or safety purpose. Require emergency orders to be limited in duration, applicability, and scope.

It is essential that government set standards for the validity of emergency orders. It is beyond an executive's regular constitutional powers to unilaterally change a law; therefore, this *de facto* lawmaking should only be valid to the extent it is fulfilling the purpose for which the exception to the norm was made. The "strict scrutiny" review standard in this recommendation is what the courts commonly apply to all deprivations of fundamental constitutional rights, which is exactly what happens when emergency orders restrict movement, travel, work, religious practice, association, the purchase of firearms or ammunition, or other constitutional rights.

When they apply strict scrutiny to infringements of constitutional rights, courts require that the government's interest is compelling and that its proposed solution is narrowly tailored to address the problem. By adopting this familiar judicial standard, a court will know that the government bears the heavy burden to prove that the deviation from the normal course was necessary to protect citizens from a health or safety emergency.

During the COVID-19 response, we have seen emergency orders arbitrarily treat similarly-situated entities and events differently. In Connecticut, for example, the governor allowed hair salons to open while nail salons had to remain closed. Casinos in Nevada can take money from hundreds of gamblers at a time, but churches can't conduct religious services for a smaller number with social distancing in place. If the governor's orders had to comply with strict scrutiny, such unequal treatments could not stand, at least not without strong proof that the distinction was necessary.

This standard should apply to statewide as well as local emergency orders, as many of the most severe government responses to COVID-19 have come at the hand of local governments.

2. Recommendation: Subject state and local emergency orders to expedited judicial review.

An emergency, by its nature, requires swift action. By explicitly stating that emergency orders are subject to expedited review, courts will be less likely to wait for the emergency to be resolved to avoid the issue. This recommendation has the added benefit of signaling to courts that emergencies are not the time to punt on an issue by calling it a “political question.”

3. Recommendation: Require that any statewide emergency orders that infringe constitutional rights be issued by the governor.

Many statewide emergency orders in response to COVID-19 were issued by public health administrators, rather than the governor. While the governor is not as directly accountable due to the length of his term and certainly not as accessible to his or her constituents as a state legislator, governors are more politically accountable than appointees.

Accountability is key to good government, and at the very least, an individual who was elected by the people should have to sign his or her name to an order that restricts liberty.

4. Recommendation: Sunset statewide emergency orders in seven days unless the legislature is in session and has adequate time to vote on it or is called into session by the governor for that purpose.

Seven days is enough time for the governor to call an emergency legislative session and for legislators to assemble. The seven days serve as a stop gap to ensure that state government is not paralyzed in its response while the legislature is convened. If the governor decides to move on without the legislature, his or her orders would be significantly limited in duration.

5. Recommendation: Sunset all statewide emergency orders in 30 days unless the legislature ratifies the order through a joint resolution or the order is terminated earlier by the legislature or governor.

The legislature is the most democratic body in state government and the most responsive to the will of the people. As such, it is the least likely to allow abuses of emergency power. And, as mentioned above, the state’s police power and authority to make law resides in the legislature. At a minimum, our elected representatives should debate and go on record regarding the continuance of emergency orders beyond 30 days.

6. Recommendation: Allow the legislature to establish rules for remote participation to debate and vote on emergency orders or permit legislatures to hold remote sessions at the direction of each chamber's presiding officer.

Twenty-three states have adopted rules that make allowances for remote voting or meetings during an emergency. This not only makes sense during a pandemic but could also be advantageous if another type of emergency arises and prevents travel.

7. Recommendation: Prohibit the governor from reissuing emergency orders that are substantially similar to any that expired due to a lack of legislative approval or were rejected.

Should the legislature put these safeguards in place, nothing would stop the governor from repealing the old order and issuing it again as a "new" order every seven days. By prohibiting the governor from reissuing the same or similar emergency orders, the legislature can prevent the circumvention of the safeguards it put in place.

¹ Sarah Mervosh, "See which States and Cities Have Told Residents to Stay at Home," New York Times, April 20, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.