



Balancing Legislative and Executive Powers in Emergencies

BY NICHOLAS BIRDSONG

As a result of the COVID-19 pandemic, each state was simultaneously placed in a state of emergency for the first time in American history. Governors have issued dozens of [executive orders](#) across the country in response to the COVID-19 pandemic, but the debate over executive authority to issue emergency orders dates back to the American Revolution.

In the [17th and 18th centuries](#), the British government appointed governors that wielded near absolute power over most of colonial America. These chief executives, accountable only to the Crown, enforced draconian laws on colonial citizens that ultimately led to the Revolution-

ary War. The memory of those royal governors would have been fresh in the minds of legislative leaders as the colonies formed their first state constitutions. In fact, all but three of the first 13 states formed weak legislatively appointed [councils](#) to perform executive functions. The first national government, established under the [Articles of Confederation](#), lacked any executive branch.

As the articles failed and states debated ratification of the Constitution, Alexander Hamilton attempted to persuade Americans of the need for a strong executive. In [Federalist Paper No. 70](#), he wrote that one would be “essential to the protection of the community against foreign attacks... [and] against those irregular and high-handed

Did You Know?

- Most state legislatures’ authority over emergency executive powers centers around their ability to cancel a state of emergency rather than individual orders.
- Puerto Rico has the only legislature responsible for approving individual orders the governor may issue during an emergency.
- The Council of State Governments tracks governors’ executive orders on COVID-19 in more than 40 categories.

combinations which sometimes interrupt the ordinary course of justice.” While legislative bodies were considered to be more democratic and deliberative, government needed to be able to respond to situations quickly and decisively—especially during emergencies. Hamilton’s arguments would eventually help persuade all states, including those that had not yet formed, to replace executive councils with governors’ offices.

The American system of [checks and balances](#) aims to maintain an executive outside the extremes of ineffective and dictatorial, even in times of disaster, when the need for swift and decisive action is at its peak. However, the means by which this balance is achieved varies between jurisdictions.

State Action

Executive powers do not extend past federal or state constitutional limits during a state of emergency. The legislatures of each state define the scope of governors’ temporarily expanded powers by statute. However, the unknown nature of potential emergencies motivated each state’s legislature to enact broad grants of authority for when an emergency is declared. The laws of 38 states may be suspended by a governor when necessary to effectuate a disaster response, and 16 states provide that a governor’s orders shall have the “full force and effect of law” while an emergency is ongoing. Only five states lack either type of provision.

Temporary executive authority to modify, suspend or create law does not grant any state’s governor the power to alter statutes that define their authority. Legislatures may then expand or limit emergency executive powers by passing new laws. However, such legislation would require either gubernatorial approval or a sufficient legislative majority to override a veto.

Legislatures maintain several other tools to prevent misuse of the expansive authority granted to governors during emergencies. In 24 states, in-

cluding the unicameral Nebraska, an emergency declaration may be terminated by a resolution passed by all legislative chambers. In Louisiana, a resolution passed by a single chamber may terminate a declaration. In six states, expanded executive power automatically ends after a period of time—between two and 60 days, depending on the state and type of emergency—unless extended by the legislature.

Emergencies may occur while the legislature is out of session, but this does not necessarily limit the legislature’s ability to check executive authority. In 36 states, the legislature may call itself for a special session. Of the remaining 14 states, all but nine legislatures are either in session for most of the year or must be called into session by the governor in a declared emergency. In the unique case of Alabama, the legislature may call for a special session exclusively during an emergency. Lastly, all state legislatures may act as a check against potential misuse of emergency authority through the courts or by threat of impeachment when the legislature resumes session.

Amid the ongoing COVID-19 pandemic, legislative chambers in at least 23 states and the Virgin Islands have introduced bills or resolutions that would limit governors’ powers or executive spending. Measures have been adopted or enacted by one or more chambers in at least nine states.

Common examples of legislative action related to executive orders include:

- Altering the maximum duration of an emergency declaration before an extension is required.
- Requiring notice to legislatures or legislative leaders when issuing orders, such as specific statutes and regulations that will be suspended or altered.
- Requiring prior notice to or approval by legislatures or legislative leaders prior to spending or transfer of funds.

Additional Resources

- [NCSL’s Legislative Oversight of Executive Emergency Powers webpage](#)
- [NCSL Resources on Special Sessions](#)
- [Executive Orders Related to the Pandemic, Council of State Governments](#)

NCSL Contact

Nicholas Birdsong
303-856-1451

Pam Greenberg
303-856-1413