

It's time to amend the Emergency Services Act

Overview

California's Emergency Services Act (ESA) contains a provision granting the governor authority to exercise all the police power vested in the state during emergencies.^[1] This provision, which is restricted to unforeseen problems and may only be invoked where necessary to further the ESA's purposes, has been used multiple times: in response to oil shortages in the 1970s, the Medfly infestation in the 1990s, and the 2020-21 wildfires. During the COVID-19 pandemic Governor Gavin Newsom used this power extensively. Although this was an appropriate response to the pandemic, it uncovered a latent defect in the ESA: the absence of mechanisms for restoring ordinary democratic processes during a prolonged statewide emergency. The ESA should be amended to correct this shortcoming and to provide for legislative involvement and partial restoration of democratic processes during lengthy emergencies.

Analysis

The ESA grants broad emergency powers, and rightly so

The ESA authorizes the governor to proclaim a state of emergency where "conditions of disaster or extreme peril" are beyond the capacity of local authorities to combat, and it grants the governor several specific powers during such emergencies.^[2] Most of these powers are bounded. For example, during a state of emergency the ESA grants the governor power to suspend regulatory statutes that interfere with efforts to mitigate the emergency's effects, to commandeer private property needed for such efforts, to assign state employees emergency duties not otherwise authorized, and to redirect unspent appropriations to emergency efforts.^[3] And during a state of emergency Government Code section 8627 gives the governor a broad general power: "the right to exercise within the area designated all police

power vested in the state by the Constitution and laws of the State of California” where necessary to effectuate the ESA’s purposes.^[4]

This emergency police power is derived almost verbatim from the 1943 California War Powers Act. That statute, enacted during World War II amid serious concerns about an attack by Imperial Japan on California, granted the governor broad power to avoid the need to declare martial law and suspend civilian government. Since that time, additional restrictions on the emergency police power have been imposed, and the legislature separated civilian emergencies from military or “state of war” emergencies. But the key language remains the same. The ESA still grants the governor “the right to exercise within the area designated all police power vested in the state” during an emergency where “necessary” to “effectuate the purposes of [the ESA].”^[5]

Recently, in *Newsom v. Superior Court (Gallagher)*, the Court of Appeal upheld the section 8627 emergency power.^[6] *Gallagher* is the first appellate decision to address section 8627. Indeed, before the COVID-19 pandemic, the ESA largely escaped judicial attention. The California Supreme Court (which denied review in *Gallagher*) has considered the ESA only once, in *Macias v. State of California*, and that decision did not squarely address the scope of the governor’s emergency powers.^[7] Court of Appeal decisions have addressed when a state of emergency may be proclaimed,^[8] and when it must be terminated.^[9] Most appellate decisions concerning the ESA, however, have turned on matters other than the scope of the governor’s emergency powers, such as whether California is immune from various claims for injuries arising out of emergency orders,^[10] or whether an individual may be prosecuted for violating executive orders after a state of emergency has terminated.^[11]

The ESA’s extensive planning requirements explain why so few disputes concerning the emergency police power arise: the ESA favors advance planning to make the need for emergency police powers less likely. It requires orders and regulations concerning emergencies to be issued in advance of a state of emergency, without

using any emergency powers, “whenever practicable.”^[12] It also requires the governor and the Office of Emergency Services (OES) to update and coordinate the state’s general emergency plan and to formulate contingency plans for specific emergencies, and it authorizes the governor to procure and pre-position emergency supplies and equipment, approve local emergency plans, and take “all other preparatory steps . . . in advance of an actual emergency.”^[13] That restricts use of the emergency police power to only unforeseen emergencies. For example, in California earthquakes are foreseeable, so the ESA requires advance earthquake planning to prevent the necessity of ad hoc emergency police powers. Consequently, the section 8627 emergency police power is an option of last resort reserved for unforeseen events.

The ESA is primarily concerned with short-lived disasters, not long-standing crises

The ESA targets sudden crises that cause immediate harm and play out quickly. It gives examples of civil emergencies: fires, floods, storms, riots, earthquakes, volcanic eruptions, and a “sudden and severe energy shortage” that is “unforeseen” and results from events such as “an embargo, sabotage or natural disasters.”^[14] Yet the ESA is not limited to such short-lived incidents. The statute defines a “state of emergency” broadly to include any “conditions of disaster or of extreme peril” beyond the control of local jurisdictions.^[15] And it notes that several potentially longer-lasting events — air pollution and an epidemic — may qualify as emergencies.^[16]

The COVID-19 pandemic is a long-lasting emergency. It proved resilient to efforts to mitigate the public health crisis, resurging in successive waves that are still ongoing. California responded by adjusting the restrictions imposed to combat COVID-19. These continued adjustments have been controversial, particularly among businesses forced to limit operations or close entirely. Some sued to overturn the restrictions, challenging the governor’s emergency powers. Those cases largely failed, partly because the restrictions were also authorized by the Department of

Public Health's independent statutory authority to combat infectious diseases.^[17] Despite their lack of legal merit, these challenges raised an important policy question: whether the governor should hold the same emergency powers during a long-lasting emergency as in shorter-duration emergencies.

The ESA's emergency powers must be adapted to long-lasting crises

The *Gallagher* case concerned executive orders issued at the request of legislators working on parallel urgency legislation for the November 2020 general election that ultimately was not in time for that election. Although the legislature did not act quickly enough early in the pandemic, it has caught up and now many aspects of the COVID-19 emergency are regulated by ordinary legislation. There is substantial potential harm in unnecessarily replacing ordinary democratic processes with emergency action, and the current overlap between the ordinary legislative process and emergency gubernatorial powers raises questions about whether one set of powers should be favored, or whether both must exist in balance.

In a long-term crisis like the current pandemic, emergency gubernatorial powers remain necessary, but must be adjusted to coexist with the regular legislative process. Earthquakes are brief events, forest fires burn out, and floods abate; those crises have clearly-defined endpoints that make it easy to determine when to end the state of emergency. But the coronavirus pandemic looks to have a long, slow fade that both continues to require swift responses and makes it more difficult to set an endpoint. That requires adjusting the current scheme to permit both emergency gubernatorial and regular legislative responses. Although the governor is able to act more swiftly than the legislature, emergency orders lack the legitimacy of policy made by statute. Consequently, when an emergency is long lasting and it becomes possible to observe some ordinary democratic processes, those processes should be incorporated into the state's emergency response.

The ESA should be amended to require legislative ratification of long-lasting emergency declarations. The ESA currently includes an emergency brake that allows the legislature to terminate a state of emergency, and along with it the governor's emergency powers, with a concurrent resolution.^[18] And the legislature retains the

authority to legislate concerning any matters addressed by emergency gubernatorial actions. But the legislature is not obligated to exercise this authority; indeed, the legislature went out of session for months in the crucial first months of the pandemic. At least nine states require their legislatures to ratify or extend a state of emergency after periods from 15 to 90 days.^[19] And where a local emergency has been proclaimed the ESA requires the governing body of a city or county to ratify the proclamation within seven days and to review the need for continuing the emergency every 30 days.^[20] A similar requirement for gubernatorial emergency proclamations would beneficially involve the legislature in emergency responses and lend greater legitimacy to them.

The legislative ratification period for statewide emergency proclamations should be six months. The seven- and 30-day periods for local emergency ratification are too short for the broader emergencies proclaimed by the governor. Similarly, the deadlines imposed by the states that require ratification afford the governor too little time to exercise emergency authority in an evolving statewide crisis. The ESA itself gives as examples long-lasting emergencies such as air pollution or droughts — those would require repeated legislative action if the review period were as short as 15–90 days. The coronavirus pandemic, which is longer-lasting than most previous emergencies, illustrates the risks of relying on legislative action: the statutes at issue in *Gallagher* took five months to pass. Accordingly, the ESA should require the legislature to initially ratify a state of emergency after six months, and to review whether to continue the emergency every six months thereafter.

These requirements need not apply to actions taken to mitigate economic displacement and other secondary effects of a disaster, which may last long beyond the disaster's initial impact. If the ESA is amended to require ratification and continuation of emergencies, it also should be amended to extend authority to take such mitigation measures beyond an emergency proclamation's termination. Many measures, particularly those providing economic relief, induce reliance that would be undercut by a periodic reconsideration requirement.

Finally, at some point the governor should be required to seek public comment regarding executive orders exercising emergency powers. Currently, the governor

may issue emergency executive orders that become effective immediately without any public notice or comment.^[21] As the emergency provisions of the Administrative Procedure Act demonstrate, it is often possible to obtain public notice and comment on an expedited basis without interfering with the need to respond quickly to an emergency.^[22] Accordingly, when an emergency has persisted long enough to require legislative ratification, absent a change creating new circumstances necessitating immediate action, the governor should be required to provide the five-day period of notice and comment ordinarily required for emergency regulations exercising the police power.

Given the recent recall attempt against Governor Newsom, some may argue that no reform is needed because the threat of a political backlash will deter future overuse of emergency powers. Yet that recall failed spectacularly; efforts are brewing to reform the recall that may significantly undermine that deterrence; and fear of a recall is a blunt instrument. And that fear might deter necessary emergency measures without ensuring any greater legislative efforts to reform the procedure. Requiring legislative ratification permits the continuance of emergency measures where needed *and* encourages greater involvement by the legislature.

Conclusion

The emergency power granted by the ESA is constitutional and a prudent recognition that some emergencies may present unforeseen problems requiring swift, executive action. Yet the COVID-19 pandemic has proved that the ESA does not suit all contingencies: during a long-lasting crisis it is unnecessary to entirely displace ordinary democratic processes with emergency authority as one would in a shorter crisis. Accordingly, the legislature should amend the ESA to provide partial restoration of those ordinary processes after a period of time sufficient to ensure an adequate initial response; six months seems appropriate. The ESA has adapted over time since its inception in the 1943 War Powers Act. That evolution should continue given the lessons from the COVID-19 pandemic.

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the California Constitution Center.

1. Gov. Code § 8627. ↑
2. Gov. Code §§ 8558, 8625. ↑
3. Gov. Code §§ 8571, 8572, 8628. ↑
4. Gov. Code § 8627. ↑
5. *Ibid.* ↑
6. *Newsom v. Superior Court (Gallagher)* (2021) 63 Cal.App.5th 1099, 278 Cal.Rptr.3d 397, 400, review den. Aug. 11, 2021. ↑
7. *See generally Macias v. State of California* (1995) 10 Cal.4th 844. ↑
8. *California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802. ↑
9. *Nat. Tax-Limitation Com. v. Schwarzenegger* (2004) 8 Cal.Rptr.3d 4. ↑
10. *See, e.g., Thousand Trails, Inc. v. California Reclamation Dist. No. 17* (2004) 124 Cal.App.4th 450; *LaBadie v. State of California* (1989) 208 Cal.App.3d 1366. ↑
11. *See Martin v. Municipal Court* (1983) 148 Cal.App.3d 693. ↑
12. Gov. Code § 8567(c). ↑
13. Gov. Code §§ 8569–8574.22. ↑
14. Gov. Code §§ 8557(g), 8558(b). ↑
15. Gov. Code § 8558(b). ↑
16. *Ibid.* ↑
17. *See Health & Saf. Code § 120140.* ↑

18. Gov. Code § 8629. ↑

19. See National Conference of State Legislatures, *Legislative Oversight of Emergency Executive Powers* (Sept. 2, 2021). ↑

20. See, e.g., Gov. Code § 8630(b), (c). ↑

21. Gov. Code § 8567(b). ↑

22. See Gov. Code § 11346.1. ↑