The Governor’s Powers Under the Emergency Services Act

Overview

The Emergency Services Act gives California’s governor broad emergency authority. Typically, the state constitution requires policy decisions (what we should do going forward) to be made through the deliberative legislative process.[1]
But in a crisis, that authority (what we should do right now) may be consolidated and exercised by one executive. After declaring an emergency, a governor may disregard
statutory law to direct state resources in responding to the crisis. By granting the governor these powers, the state legislature delegated its power to fix public policy and deploy funds during emergencies. This raises some separation of powers concerns that, while meritorious, have not proved so severe that California risks dictatorship.

Analysis

The Emergency Services Act grants broad powers

The Emergency Services Act establishes statewide emergency standards in the event of natural, manmade, or state-of-war emergencies that put in peril the life, property, and resources of California citizens.[2]
A governor has authority to proclaim a “state of war emergency,” “state of emergency,” or “local emergency.”[3]
No preliminary findings are required — a governor need only decide that the proclamation circumstances exist.[4]
In an emergency, a governor may exercise California’s sovereign authority to the fullest extent possible, consistent with individual rights and liberties.[5]
The ESA grants the governor several powers, including the power to:

- Suspend any regulatory statute, statutes for state

business procedures, and any state agency edicts.[6]
- Commandeer private property or personnel (except news services).[7]
- Make expenditures from any available fund.[8]

The ESA makes it a crime to refuse or willfully neglect to obey emergency orders or regulations.[9]
And it insulates the state from liability for any claim based on the exercise, performance, failure, or discretionary choice made under the act's authority.[10]

The separation of powers issues are resolvable

Emergencies obviously call for swift, centralized decision-making. But the ESA says little to guide executive discretion in declaring emergencies. The ESA is not by its terms limited to the classic earthquake, fire, or invasion scenarios, raising concerns that the delegation of legislative power is so great that it unconstitutionally changes the balance of power. The risks are that a governor could in good faith declare an emergency for a condition that unforeseeably extends far into the future, or that a governor in bad faith conjures an emergency that necessarily will continue indefinitely. Those concerns implicate the separation of powers doctrine.

Unlike the federal charter, California's constitution has an express separation of powers provision. By its text, Article III, section 3 seems to require the three branches to be hermetically sealed from each other: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." But the California Supreme Court has acknowledged that the three state government branches are interdependent and may, to a degree, share their powers.[11]
Because the state's three branches share common boundaries, California's separation of powers doctrine seeks to maintain the sensitive balance between the branches and assumes a certain degree of mutual oversight and influence.[12]
The judicially enforced limit is this: a branch of government cannot assume the core powers or functions of another branch.[13]

Federal separation of powers doctrine is not binding on California courts. Yet a key feature of federal separation of powers doctrine, the *Youngstown* analysis, is a useful frame for evaluating the ESA.[14] In his *Youngstown*concurrence, Justice Robert H. Jackson described a three-level vision of executive power. In his view, the greatest level of executive power exists when it acts with legislative authority because that scenario combines all the executive's constitutional powers with those of the legislative branch. The executive has less power to act when the legislative branch has parallel authority—there, the executive must have both constitutional authority and grounding in separation of powers considerations. The executive has the least power when acting contrary to a legislative enactment because that executive action relies on the executive's constitutional powers without the legislative branch's powers over the subject matter.

California's governor holds the state's "supreme executive power."[15] The state's legislative power is vested in the legislature.[16] Absent constitutional justification, executive officers cannot exercise legislative powers.[17] And no express provision in the state constitution resembles the ESA's grant of legislative power: exclusive authority to appropriate funds, and unrestrained power to waive statutory laws.[18] The ESA itself — a statutory act — cannot provide the necessary permission, so there must be some other unexpressed or general constitutional justification for a governor to exercise the ESA's legislative powers.

The separation of powers doctrine provides that justification, although it may seem counterintuitive. The ESA seems to accomplish exactly what the separation of powers doctrine intends to prevent: the combination in the hands of a single person or group of the basic or fundamental powers of government.[19] Yet that is the doctrine a court would use to both justify the ESA and uphold the legislature's delegated powers if a governor refuses to surrender them. The

legislature has authority to terminate an emergency by concurrent resolution.[20] But assume that a hypothetical governor ignores the concurrent resolution and continues to exercise ESA powers long after the emergency ended. The legislature could pass an amended ESA, or void it, and even override a gubernatorial veto — but a governor could then claim that the existing emergency powers confer authority to ignore those things as part of the executive response to the ongoing emergency. That debate would quickly land in the courts, which would then need to resolve the separation of powers issue.

The ESA does not present the more typical separation of powers problem where a branch over-regulates another branch or attempts to usurp its powers. Instead, this is a delegation issue. By granting governors emergency declaration power, the legislature has delegated some of its core powers to the executive. In the *Youngstown* framework, a governor acting under the ESA wields maximum constitutional powers: the supreme executive power *and* some lawmaking authority. The question is whether a court would conclude that the legislature ceded too much of its core appropriations and policymaking powers.

There are two ways to handle the separation of powers problem the ESA presents. One rationale relies on the fundamental judicial power to resolve interbranch disputes. The judicial power includes policing the branches to maintain separation of powers.[21] The California Constitution Center has argued that a material impairment occurs only when one branch eliminates or controls the discretion of another branch in exercising its core power.[22] This permits an emergency delegation of some legislative core powers to the executive so long as the legislature maintains control of the discretion of the other branch in exercising that power. In the emergency context, this means that a court could uphold the temporary delegation of legislative power to the executive because the grant is neither permanent nor irrevocable.

Indeed, the ESA itself provides a check against a governor's attempt to aggrandize itself by retaining emergency powers after a crisis ends:

The act requires the governor to end a state of emergency "at the earliest possible date that conditions warrant," and the legislature can terminate a state of emergency by concurrent resolution.[23]
If the legislature is concerned enough about an overlong emergency declaration that it demands judicial intervention, it can terminate the state of emergency and retrieve its powers. If the legislature can retrieve its powers, temporarily ceded in an emergency, then its powers have not been lost. In our hypothetical dispute above, a court could use this analysis to justify ruling for the governor in the short term, or ruling for the legislature in the long term — upholding the ESA in either scenario.

The other rationale is the delegation analysis, which asks whether the legislature impermissibly delegated its core powers without providing an adequate yardstick to guide executive action under the ESA.[24]
The legislature may delegate some authority to the executive branch when it provides "an adequate yardstick for the guidance for the administrative body empowered to execute."[25]
The guidance is necessary: otherwise, the legislature could confer unrestricted authority to make fundamental policy decisions, which would violate separation of powers because generally the legislature cannot escape its policy-making responsibility
by delegating it to other branches.[26]

The ESA's sole guidance is in how it describes the grounds for an emergency proclamation: a governor is empowered to proclaim a state of emergency when the governor "finds that circumstances" amounting to a state of emergency exist, and either a local authority requests the declaration or the governor "finds that local authority is inadequate to cope with the emergency."[27]
The ESA defines a "state of emergency" as "the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state" caused by such conditions as fire, flood, storm, epidemic, riot, drought and other calamities.[28]
That definition is circular: the emergency proclamation power's existence depends on a governor's proclamation that an emergency exists.[29]
And as in our hypothetical above, the ESA assumes that a governor will act in

good faith in both declaring and ending an emergency.

Even that broad delegation, and its equally liberal guidance, is permissible because the grant of legislative power is neither complete nor permanent. Delegation is merely a particular variety of separation of powers problem. The ultimate separation of powers limit is that one branch cannot exercise the complete power of another branch.[30] Absent abuse, the ESA does not violate that principle because the legislature still holds all its legislative power and, as discussed above, can retrieve the limited amount temporarily granted to the governor.

Separation of powers is equally concerned with doctrinal purity and practical reality. The doctrine is not intended to take away the flexibility that the branches need to operate in an effective and efficient manner.[31] In an emergency, practical reality governs, and a court would be reluctant to restrict that flexibility and disrupt the government's good faith crisis response.[32] In contrast, in a bad faith or abuse of discretion scenario, a court likely would enforce the inter-branch boundaries, uphold the legislature's core powers, and order them restored. Separation of powers is violated "only when the actions of a branch of government defeat or materially impair the inherent functions of another branch."[33] The ESA could be used to defeat or materially impair the legislature's core powers, but it does not necessarily do so.

Conclusion

California is not likely to become a dictatorship. The emergency powers the ESA grants to governors to make solo policy decisions do implicate the separation of powers. In the short term those concerns may be allayed, and the delegation justified. In the long term, a court would act to preserve core executive and legislative functions. California benefits from its governor having all necessary powers to quash a crisis, and the state is designed to return to normal when the emergency ends.

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[1] *Carmel Valley Fire Prot. Dist. v. State of Cal.* (2001) at 643 (essentials of the legislative function include the determination and formulation of legislative policy).

[2] Gov. Code § 8550.

[3] Gov. Code § 8558 (definitions); Gov. Code § 8625 (proclamation guidelines).

[4] *Cal. Correctional Peace Officers Assn. v. Schwarzenegger* (2008) at 820.

[5] *Macias v. State of Cal.* (1995) at 854. See *Cal. Correctional Peace Officers Assn.*, *supra* note 4, at 811, describing the governor's power to declare a state of emergency and the broad powers that declaration confers to deal with such emergencies by, for example, suspending any regulatory statute or the orders, rules, or regulations of any state agency, commandeering or use any private property or personnel deemed necessary to carry out his responsibilities, and spending from any fund legally available to deal with actual or threatened conditions of a state of emergency.

[6] Gov. Code § 8571.

[7] Gov. Code § 8572.

[8] Gov. Code § 8645. This overrides the legislature's otherwise-exclusive appropriation

power. *Carmel Valley Fire Prot. Dist.*, *supra* note 1, at 643 (core functions of the legislative branch include passing laws, levying taxes, and appropriating funds); *St. John's Well Child & Family Center v. Schwarzenegger* (2010) at 965; *Super. Ct. v. County of Mendocino* (1996) at 53 (executive branch ordinarily "may not disregard legislatively prescribed directives and limits pertaining to the use of such funds").

[9] Gov. Code § 8665; see also *Martin v. Mun. Ct.* (1983), rejecting a challenge to a criminal charge of disobeying an emergency order by failing to strip a garden of fruit fly host material.

[10] Gov. Code § 8655.

[11] For example, the governor acts in a legislative capacity when vetoing legislation. *Harbor v. Deukmejian* (1987) at 1084; *Carmel Valley Fire Prot. Dist.*, *supra* note 1, at 641–42.

[12] California decisions long have recognized that the separation of powers doctrine contemplates that the three departments are in many respects mutually dependent, and that the actions of one branch may significantly affect those of another branch. *Super. Ct. v. County of Mendocino* (1996), *supra* note 8, at 52.

[13] *Carmel Valley Fire Prot. Dist.*, *supra* note 1, at 641 (separation of powers doctrine limits the authority of one of the three branches of government to seize the core functions of another branch).

[14] *Youngstown*

Sheet & Tube Co. v. Sawyer (1952) at 635 (conc. opn. of Jackson, J.).

[15] Cal.
Const., art. V, § 1.

[16] Cal.
Const., art. IV, § 1.

[17] *Deukmejian*,
supra note 11, at 1084.

[18] *Carmel*
Valley Fire Prot. Dist., *supra* note 1, at 299 (legislature's
core powers include passing laws, levying taxes, and appropriating funds).

[19] *Davis*
v. Mun. Ct. (1988) at 76.

[20] "All
of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end." Gov. Code § 8629.

[21] *Carmel*
Valley Fire Prot. Dist. at 642 (courts have not hesitated to strike
down laws that violate separation of powers).

[22] Carrillo
& Chou, *California Constitutional Law: Separation of Powers* (2011)
45 U.S.F. L.Rev. 655, 682.

[23]
Gov. Code § 8629.

[24]
Delegation typically concerns administrative agencies. The rule is that while

delegating some governmental authority to an administrative body is proper, delegating absolute legislative discretion is not, so courts require that a delegating statute establish "an ascertainable standard to guide the administrative body." *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) at 448.

[25] *Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) at 817.

[26] *Id.* at 816.

[27] Gov. Code § 8625.

[28] Gov. Code § 8558 subd. (b).

[29] See, e.g., *Martin v. Mun. Ct.* (1983) at 697, rejecting a challenge to an emergency proclamation's lack of findings and holding that nothing in the ESA requires the governor to make findings.

[30] *Laisne v. State Bd. of Optometry* (1942) at 835.

[31] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, *supra* note 14, at 635 (conc. opn. of Jackson, J.).

[32] See, e.g, *Susman v. City of Los Angeles* (1969) at 818–19 (holding that when and under

what circumstances the National Guard should be called up to preserve the peace is a discretionary gubernatorial decision and not one subject to judicial inquiry or review).

[33] *In re Rosenkrantz* (2002) at 145 (separation of powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch); see also *Marine Forests Society v. Cal. Coastal Com*. (2005) at 15 (separations doctrine violation occurs where “the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch’s exercise of its constitutional functions”).