

California's governor can commandeer sheriffs

Overview

In an emergency, California's governor can commandeer the county sheriffs and make them part of the state's emergency response. The COVID-19 pandemic showed that local law enforcement can impede the state's emergency response, as when some county sheriffs refused to enforce Governor Gavin Newsom's emergency orders. Governor Newsom could have used constitutional tools to compel sheriffs to enforce his orders: by assuming constitutional power to supervise sheriffs or through judicial orders to compel compliance. Future governors could consider those paths in California's next emergency.

Analysis

Patchwork enforcement of gubernatorial emergency orders is problematic

To combat the nascent COVID-19 contagion, on March 4, 2020 Governor Newsom used the authority granted by California's Emergency Services Act to issue a broad "stay-at-home" executive order.^[1] The order directed "all residents . . . to immediately heed the current State public health directives" and ordered "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors."^[2]

But the sheriffs of Los Angeles, Orange, and Riverside Counties refused to enforce that order.^[3] For example, Orange County Sheriff Don Barnes referred to the stay-at-home order as "a matter of personal responsibility and not a matter of law enforcement."^[4] Los Angeles County Sheriff Alex Villanueva similarly refused to enforce the stay-at-home order.^[5]

By refusing to enforce Newsom's emergency order, these sheriffs impeded its

purpose of “establish[ing] consistency across the state in order to ensure that we mitigate the impact of COVID-19.” The result was that more Californians left home and more businesses remained open. This allowed more viral transmission when the governor was seeking to “bend the curve and disrupt the spread of the virus.”^[6]

If it recurs in the future, a governor can attack this local recalcitrance problem by relying on executive authority to commandeer county sheriff agencies to enforce emergency orders. A governor can compel sheriffs to enforce state laws through the attorney general’s constitutional authority to directly supervise the sheriffs, or by obtaining a court order.

The governor can control sheriffs through direct supervision

To ensure that sheriffs comply with and enforce emergency orders, a governor can direct the attorney general’s constitutional power of sheriff supervision. And governors may have authority to bypass the attorney general and directly supervise sheriffs. These conclusions follow from the executive branch hierarchy created by California constitution article V, section 13, which makes the governor the attorney general’s boss and the attorney general the sheriff’s boss.

The governor can direct and control the attorney general. “Subject to the powers and duties of the Governor” the attorney general is “the chief law officer of the State.”^[7] Under Article V, section 13, the attorney general’s powers are “subject to” the governor’s powers.^[8] The California Supreme Court read this clause as subordinating the attorney general to the governor in the event of a conflict.^[9] This suggests that the governor may direct the attorney general to exert supervisory power over sheriffs, since the governor retains the “supreme executive power.”^[10]

And the attorney general can direct the sheriffs. The attorney general “shall have direct supervision over every district attorney and sheriff . . . in all matters pertaining to the duties of their respective offices.”^[11] The attorney general “may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as the

attorney general may seem advisable.”^[12] This gives the attorney general power to override and direct a sheriff’s enforcement discretion.

If a sheriff refuses to comply, Government Code section 12561 gives the attorney general power to appoint a quasi-sheriff tasked with enforcing a single law.^[13] Policing emergency order violations qualifies as a “particular crime” because violations of emergency orders are misdemeanors.^[14] Section 12561 permits the attorney general to appoint a “competent person” in addition to, or potentially in place of, the elected sheriff. This exclusive appointment authority permits the attorney general can name a single-issue sheriff if an elected sheriff is inadequately “investigati[ng] or detecti[ng] ... a particular crime.”^[15] And a governor can direct an attorney general to use this power to appoint single-issue sheriffs with a roving writ to enforce emergency orders.

The attorney general has direct law enforcement powers as well. The attorney general’s office commands its own investigative law enforcement agency, the Division of Law Enforcement, which could be sent to recalcitrant counties to enforce emergency orders where sheriffs refuse.^[16] The attorney general could also assume jurisdiction over any resulting criminal prosecutions, bypassing local district attorneys, allowing for vertically integrated investigations and prosecutions that bypassed recalcitrant county actors.^[17]

Thus, a governor can either override or outmaneuver sheriffs who refuse to enforce emergency orders by directing the attorney general to assume control over the sheriffs, to name single-issue sheriffs, or to directly enforce the orders with state law enforcement personnel.

Lawsuits to compel enforcement are possible where the legislature has displaced common law discretion

A governor may sue to compel sheriffs to enforce state law and emergency orders. This solution is inferior to the options outlined above, because court orders may conflict with the sheriff’s traditional enforcement discretion.

That tradition is important because the sheriff itself is an ancient office. Modern county sheriffs are “state officers while performing state law enforcement duties”^[18] and are locally and independently elected.^[19] Yet sheriffs retain a common law connection given their old English origins, and their discretion survives unless it is inconsistent with constitutional or statutory law.^[20] This interstitial common law is routinely applied in the criminal law context.^[21] Here, a court must determine that the legislature intended to occupy the field and impose mandatory enforcement obligations on sheriffs (and thus to displace common law discretion) — otherwise a sheriff has an argument that common law discretion applies to local enforcement of emergency orders. Even so, courts will compel law enforcement officers to perform legally required duties, which include carrying out court orders.^[22] Thus, a sheriff has no discretion to ignore a court order.

Of course, the larger problem is that separation of powers concerns will make courts hesitant to interfere with a sheriff’s exercise of discretion. A court is unlikely to grant, for example, a writ of mandate instructing a county sheriff to enforce a particular criminal statute in a particular way.^[23] And there is an obvious practical problem: courts are ill-equipped to monitor compliance. Even with close supervision, no judge can tell whether deputies are being diligent or dilatory.

But the threshold question remains whether the legislature displaced the sheriff’s common law discretion regarding emergency order enforcement. The legislature certainly can do so: the California constitution specifies its power and responsibility to “provide for county powers [and] an elected county sheriff,” as well as the police power to enact criminal laws that the sheriff enforces.^[24] This gives the legislature general authority to override the sheriff’s background common law discretion.

There is an argument that the legislature has used its public health authority to override sheriff discretion in the emergency context. The legislature has plenary authority to legislate unless limited by the state constitution.^[25] In the pandemic context, that means the legislature has plenary authority to legislate public health

policy^[26] and to impose public health duties on the sheriff.^[27] It did so with the Emergency Services Act, which is a uniform statewide law enforcement policy. Such a detailed “[g]eneral and comprehensive legislation”^[28] that occupies the field^[29] permits the governor to issue legally binding orders^[30] and vests governors with “complete authority over all agencies of the state government” and full exercise of the state’s police power when a state of emergency is declared.^[31] And the ESA provides that the sheriff (as emergency services director) “shall have the duties prescribed by state law and executive order,” which implicitly commandeers sheriffs into state service in the emergency context.^[32] This demonstrates legislative intent to displace the sheriff’s common law discretion over enforcement decisions in emergencies where statewide law enforcement coordination is a priority.^[33]

Sheriffs have broad but not total discretion in law enforcement

Sheriffs could attempt to defend against these attacks by relying on the traditional discretion peace officers have in deciding how to enforce the law. In general, American law enforcement officials have wide discretion to choose how their resources are deployed. This discretion is “deep-rooted . . . even in the presence of seemingly mandatory legislative commands.”^[34] Indeed, “[a] well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”^[35]

That’s also true in California, with the principle of executive discretion having roots in the separation of powers doctrine. California’s separation of powers “would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon nothing more than a vague fear or suspicion that its officers will be unfaithful to their oaths or unequal to their responsibility.”^[36]

This applies to sheriffs just as to other peace officers. Courts often decline to review law enforcement decisions about what constitutes an arrestable offense.^[37] “It is for the law enforcement officer in the first instance to decide” whether someone is

violating any criminal laws.^[38]

But it's another matter when non-enforcement of a given state law is not merely a fact-specific, discretionary decision by a single law enforcement officer, but instead the announced policy of an entire sheriff's department. In such a case, the law enforcement officer is not truly "decid[ing] whether" members of the public "are violating any criminal laws."^[39] Instead, the sheriff is declining outright to enforce the law.^[40] Such a blanket repudiation of a criminal law looks less like a valid exercise of law enforcement discretion, and more like an invasion of the lawmaker's authority to criminalize conduct. That scenario is less about discretionary enforcement decisions that are immune from judicial oversight and more about judicially cognizable official misconduct.

Conclusion

Although Governor Newsom held broad authority (on paper) over sheriffs from the governor's constitutional and statutory powers, he refrained from exercising that authority to its fullest theoretical extent as described here. That may have been wise: legal authority does not always translate into practical authority. Constrained by political realities, Governor Newsom declined battle with county sheriffs. Yet in a future emergency, a governor may see a real need to commandeer their departments to enforce emergency orders. That future governor has the constitutional and statutory tools necessary to make that happen.

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1. Governor's Exec. Order No. N-33-20 (March 4, 2020); Gov. Code § 8550 et seq. For a thorough discussion of gubernatorial emergency powers, particularly in the COVID-19 context, see Daniel H. Bromberg, California Constitutional Law: The Emergency Police Power (2022) 57 U.S.F. L. Rev. 23. ↑

2. Governor's Exec. Order No. N-33-20 (March 4, 2020). ↑
3. See Demsas, *Southern California Sheriffs Are Refusing to Enforce Stay-at-Home Orders*, Vox (Dec. 10, 2020); @BillFOXLA, Twitter (Dec. 3, 2020); @OCSheriffBarnes, Twitter (Dec. 5, 2020, 2:52 PM); Damien & McCain, *Riverside County Sheriff Calls Stay-at-Home Order 'Ridiculous,' Says Newsom Hypocritical*, Desert Sun (Dec. 5, 2020). ↑
4. @OCSheriffBarnes, Twitter (Dec. 5, 2020). ↑
5. See Demsas, *Southern California Sheriffs Are Refusing to Enforce Stay-at-Home Orders*, Vox (Dec. 10, 2020); Gov. Code § 12561; Cal. Const., art. V, § 13. ↑
6. See Governor's Exec. Order No. N-33-20 (March 4, 2020). ↑
7. Cal. Const., art. V, § 13 (emphasis added). ↑
8. *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d at 158-59 (hereafter *Brown*). ↑
9. *Id.* at 150, 158-59. ↑
10. *See id.* ↑
11. Cal. Const., art. V, § 13. ↑
12. *Id.* ↑
13. Gov. Code § 12561. The attorney general "may appoint some competent person to perform the duties of sheriff with respect to the investigation or detection of a particular crime and cause the arrest of persons in connection therewith. Any person so appointed has all the powers of a sheriff with respect to the particular matter." ↑
14. *Id.*; Gov. Code § 8665. ↑
15. See Gov. Code § 12561; Gov. Code § 12561. Section 12561 has yet to be

tested in this manner. “How often, if ever, this theoretical power is exercised is unclear, but in the vast majority of cases sheriffs appear to retain wide autonomy (restrained of course by general state law) over formulation of law enforcement policies and their implementation.” *Venegas*, 32 Cal.4th at 858 (conc. opn. of Werdegar, J.). ↑

16. Office of the Attorney General, Law Enforcement (2023). ↑
17. Gov. Code § 12550 (“The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge ... [He may] take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction.”). ↑
18. *See Venegas*, 11 Cal.Rptr.3d at 704. ↑
19. Cal. Const., art. XI, § 4(c); Cal. Const., art. XI, § 1(b). ↑
20. “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” Civ. Code § 22.2. ↑
21. *See, e.g., People v. Woods* (1992) 8 Cal.App.4th 1570, 1581–83. (discussing the surviving common law rule of aider and abettor liability); *People v. Mendoza* (1986) 183 Cal.App.3d 390, 400 (applying a common law rule regarding personal names in the context of prior convictions under different names); *People v. Rehman* (1967) 253 Cal. App. 2d 119, 150–51 (applying common law rules of statutory interpretation to criminal statute). *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1050 (“[T]he general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject or, in other words, to ‘occupy the field.’”) (citation omitted). ↑
22. *See, e.g., Barnett v. State Farm General Ins. Co.* (2011) 200 Cal.App.4th 536, 545–546 (officer obligated to carry out a warrant); *see also Anderson v. Geist*

(2015) 236 Cal.App.4th 79, 87 (“At base, the execution of a warrant is not an exercise of rights by the peace officer; it is the performance of a mandatory duty, at the direction of the court”). ↑

23. Mandamus will lie to compel a public official to perform an official act required by law, but not to control an exercise of discretion — i.e., to compel an official to exercise discretion in a particular manner. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442; *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 326 (it is “elementary” that mandamus issues only to compel the performance of an act which the law specially enjoins and will not lie to control discretion). Even if mandamus would lie against a non-enforcement policy, it would not compel enforcement of a particular law in a particular instance. “The sheriff is sworn to, and is under a duty to, enforce the criminal laws and in the performance of that duty he is in part protected by law in the exercise of official discretion. It is for the law enforcement officer in the first instance to decide whether plaintiffs are violating any criminal laws. This discretionary power is too vital to the interest of public order to be subjected to restraint by courts. It is a power possessed and exercised as a part of the independent coordinate power of the executive branch of the government, and for that reason, if for no other, is not under the circumstances subject to interference by the judicial branch of the government.” *Manchel v. Los Angeles Cnty.* (1996) 245 Cal.App.2d 501, 510. ↑
24. Cal. Const., art. XI, § 1(b) ↑
25. *Marine Forests Soc. v. Cal. Coastal Comm’n* (2005) 36 Cal.4th 1, 31; *Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234 (“[T]he Legislature is vested with the whole of the legislative power of the state.”); *People v. Tilton* (1869) 37 Cal. 614, 626 (“State Constitutions are not grants of power to the Legislature.”). ↑
26. *See, e.g., Marine Forests*, 36 Cal.4th at 31; *Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234; *People v. Tilton* (1869) 37 Cal. 614, 626. ↑
27. Gov. Code § 22602. ↑

28. *See Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 863–64 (quoting *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285). ↑
29. *See Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1050. ↑
30. Gov. Code § 8567(a). ↑
31. Gov. Code § 8627. ↑
32. *See* Gov. Code § 22621. ↑
33. *See id.* ↑
34. *Town of Castle Rock v. Gonzales* (2005) 545 U.S. 748, 761. ↑
35. *Id.* at 748–749. ↑
36. *Triple A Mach. Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 145. ↑
37. *See, e.g., Manchel*, 245 Cal.App.2d at 510. ↑
38. *Id.*; *see also Doe v. Ventura Cnty. Sheriff's Dep't* (2003) No. B159425, 2003 WL 21978625 at *4 (“[R]espondent has discretion to determine whether a patient’s possession or cultivation of marijuana is noncriminal under the Act. That discretion is not ‘subject to interference by the judicial branch of the government.’” (citation omitted)). ↑
39. *See Manchel*, 245 Cal.App.2d at 510. ↑
40. *See id.* ↑