BY NICHOLAS BIRDSONG

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Balancing Legislative and Executive Powers in Emergencies

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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, including 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.