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PERSPECTIVE

The governor's emergency powers are just right

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As Californians face the COVID-19 pandemic, questions are swirling about how the government can and should respond in an emergency, and some commentators have raised the specter of martial law and whether citizens should be concerned about an executive taking advantage of the crisis. Although the state's constitutional and statutory framework provide the governor with significant concentrated authority in a time of crisis, Californians should not worry about the risk of a permanent autocratic state.

Typically, the state constitution requires policy decisions (what we should do going forward) to be made through the deliberative legislative process. But in a crisis that authority (what we should do right now) may be exercised by one executive. The Emergency Services Act gives California's governor broad emergency authority. After declaring an emergency, a governor may marshal all the state's resources to respond to the crisis. During emergencies the State Legislature has delegated to the governor its power to fix public policy and deploy funds. This raises some separation of powers concerns that, while meritorious, are not so severe that California risks dictatorship.

The ESA establishes statewide standards for natural or manmade emergencies in California. A governor has authority to proclaim such an emergency without any preliminary findings — a governor need only decide that the proclamation circumstances exist. Gov. Code Sections 8558, 8625. The ESA grants the governor several powers: to suspend laws, commandeer private property or personnel, and spend from available funds, overriding the Legislature's otherwise-exclusive appropriation power. Gov. Code Sections 8571–72, 8645.

Yet the ESA says little to guide executive discretion in declaring emergencies. This lack of guidance risks a governor, even in good faith, declaring an emergency for a condition that unforeseeably extends far into the future, or a governor in bad faith conjuring 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 (Article III, Section 3), which seems to require the three state government branches to be hermetically sealed from each other. But the California Supreme Court has acknowledged that the branches are interdependent and may, to a degree, share their powers. Because the branches share common boundaries, California's separation of powers doctrine seeks to maintain the sensitive balance between them and assumes a certain degree of mutual oversight and influence. The judicially enforced limit is this: a branch of government cannot assume the core powers or functions of another branch. *Carmel Valley Fire Prot. Dist. v. State*.

Absent constitutional justification, executive officers cannot exercise legislative powers. And no state constitutional provision supports the ESA's grant of legislative power to the executive. 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 this may seem counterintuitive. The ESA seems to allow exactly what the separation of powers doctrine intends to prevent: combining the fundamental powers of government in one actor. Yet separation of powers is the doctrine a court would use both to justify the ESA and to restore the Legislature's delegated powers if a governor refuses to surrender them. The Legislature has authority to terminate an emergency by concurrent resolution. Gov. Code Section 8629. But assume that a hypothetical governor ignores that 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 existing emergency powers confer authority to ignore those acts 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.

Fortunately, the judicial power includes policing the branches to keep their powers separate. Courts could uphold the ESA by finding that the executive has not assumed the core powers or functions of the Legislature so long as any powers granted to the executive are indeed temporary. 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 justify ruling for the governor in the short term or ruling for the Legislature in the long term — upholding the ESA in either scenario.

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. In an emergency, practical reality governs, and a court would be reluctant to restrict that flexibility and disrupt the executive's good faith crisis response. But 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." *In re Rosenkrantz*. The ESA could be used to defeat or materially impair the Legislature's core powers, but it does not necessarily do so.

A separate question could arise in the unlikely scenario where a governor declares martial law. Under Article V, Section 7, the governor may order the "militia" to "execute the law," and the ESA preserves that power, Gov. Code Section 8574. In the United States, this power has historically been exercised only during actual combat, such that ordinary civil institutions are unable to function; under martial law, civil law is supplanted by military authority. But no California governor has formally declared martial law (though they have mobilized troops, as in 1934 when Governor Frank Merriam briefly placed soldiers on San Francisco's docks to quell a labor protest).

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's governor has all necessary powers to quash a crisis, and the state is designed to return itself to normal when the crisis abates. ■

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