

Gavin Newsom, California's Ambassador

"Where is it written that a governor is barred from representing their state's interests abroad?" ask David Carrillo and Stephen Duvernay of the California Constitution Center at Berkeley Law.



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By David A. Carrillo and Stephen M. Duvernay | October 30, 2023 at 07:56 PM

The recent photo of California Gov. Gavin Newsom meeting with President Xi Jinping of China raised questions in some quarters about why a state governor was meeting with a foreign premier. A natural first reaction is that states can't do foreign policy, which is the federal government's exclusive domain. But the real question is: Where is it written that a governor is barred from representing their state's interests abroad?

Looking first at the powers expressly withheld from the states by the federal Constitution's text, several sections seem relevant. Article I, Section 8 assigns certain powers to Congress; Article II, Section 2 assigns specific powers to the president; and Article II, Section 10 bars the states from doing some things. Either expressly or by necessary implication, the states lack all those powers. A state cannot, for example, sign a treaty or agreement with a foreign power (Article I, Section 10, clause 1 and 3; Article II, Section 2, clause 2), appoint ambassadors (Article II, Section 2, clause 2), or regulate foreign commerce (Article I, Section 8, clause 3). So long as a state governor travels as a governor (not an ambassador) and signs no treaties, nothing in the federal constitution's text bars a meeting like that between Newsom and Xi.

General federalism principles permit state governors to have state visits. By our nation's design, some things are assigned to the federal government, others are reserved to the states, and there are zones of overlapping authority. Like separation of powers, federalism is both an unstated design feature and a flexible principle that can adapt to the country's needs. At times it is best for the nation to speak with one voice, and at others we can benefit from leveraging the distributed power of the 50 states that compose the nation. Because the federal constitution assigns only specific foreign relations powers to the federal government, outside those contexts the states retain sovereign authority to advance their interests in ways that do not tread on federal authority.

Nor does any judicial authority deter a state governor from traveling to converse with foreign leaders in their capitals. There are some clear guardrails: for example, in *United States v. Texas* (2023) 599 U.S. 670, the high court held that states cannot direct the federal executive's discretion over law-enforcement or foreign-policy objectives. Conversely, courts have applied the Tenth Amendment anti-commandeering rule to bar federal authorities from pressing state resources into enforcing federal law. Yet between those poles lies a wide range of overlapping activity where a state can (and perhaps must) supplement federal action.

The National Guard is a good example of such joint authority, because both a state governor and the federal president can exercise authority over a state's Guard units. Even immigration, a classic federal issue, permits state action: To counter mass illegal border crossings that have overwhelmed federal authorities, Texas has deployed its law enforcement resources to stem the tide. Indeed, California cities with sanctuary policies (San Francisco, for example) have come under fire for not doing enough to assist federal immigration authorities.

California's constitution presents no bar. As a document of limitation on a state government's plenary authority rather than a grant of power to a limited government, one must find something in the state constitution that expressly or by necessary implication denies its governor any ability to represent the state's interests outside its borders. Because there is no such prohibition, other principles drive the answer. When California needs to speak with a single voice, as in an emergency or when treating with the federal government, the California Supreme Court held in *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, that the state's governor is its representative. The same should be true when California needs or wants to confer with foreign governments, as when California Gov. Jerry Brown convened the Global Climate Action Summit in San Francisco in 2018.

A state's foreign relations may not even depend on a politically friendly federal administration. A president certainly could try to stop a state governor from traveling abroad, or attempt a carrot-and-stick approach with favors dangled or withheld. Yet even an openly hostile state-federal relationship did not deter another California governor (Jerry Brown) from meeting with Xi in 2017. If the animosity between Brown and former President Donald Trump was insufficient to scuttle that trip, the same-party state-federal relationship California currently enjoys should open the door even further. Indeed, public news reports described close coordination between Sacramento and the White House regarding Newsom's trip to China.

States often have their own foreign trade and relations interests to advance, providing good reasons to forge international ties. California's technology and agriculture sectors are highly interdependent with foreign markets: according to the California Chamber of Commerce, Mexico is California's primary export market, and in 2022 California was the second largest exporting state to Mexico. So important is foreign trade to California—the fourth or fifth-largest economy in the world—that in 2019 Newsom named Lt. Gov. Eleni Kounalakis as California's International Affairs and Trade Development representative, and in 2022 he renewed her position as his top representative to advance California's economic interests abroad.

Finally, there may be times when a state will be better suited to a diplomatic mission than the federal foreign service. In 1972, only President Richard Nixon could go to China because his

hawkish position on Communism meant he traveled with political strength, while a conciliator would have looked like a weak appeaser. Today, neither President Joe Biden nor Xi could travel to the other's capital without appearing to bend to the other's superior position. But if a neutral intermediary makes China a stop on an international trip, and brokers a deal for the two leaders to meet in the middle on an issue of common interest, then neither leader loses face and everyone can claim progress was made. Only California's governor could go to China—and he did.

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