

# EXECUTIVE EMERGENCY POWERS: THE STABILITY OF ACCOUNTABILITY

In recent years, it seems nearly every aspect of society has become fixated on the federal government and national politics. However, as history is apt to do, we may be seeing the pendulum swing the other way. In addition to changing how we shop, eat, work, and communicate, the COVID-19 pandemic is bringing increased focus on state and local policies and powers. With “policing powers,” laws related to the safety, health, and well-being of citizens, nearly completely vested in state governments under the 10th Amendment to the U.S. Constitution, state policymakers, and particularly governors, have never received as much collective attention as they have during the current pandemic. Governors such as Andrew Cuomo, Gretchen Whitmer, Kristi Noem, and even Tennessee’s Bill Lee have received national coverage of their leadership and varying responses to the pandemic. And we should not be surprised. Thomas Jefferson once said, “In times of peace, people look most to their representatives; but in war, to the executive solely.” In the fight to contain the Coronavirus, governors have issued sweeping executive orders, shut down businesses, and mobilized vast amounts of resources. This has led many to question the executive branch’s power and call for a full review in states across the country.

As chief executives, governors and mayors do—and should—have the authority to coordinate and lead their states’ and localities’ response to emergencies. However, no branch’s power is absolute, and checks and balances should exist in order to protect citizens’ liberty, even in times of crisis.

## LIMITED AND SPECIFIC

Under Tennessee Code Annotated § 58-2-107, the governor is granted the authority to declare and lead emergency response efforts, which includes mustering the National Guard, utilizing all the state’s resources, or suspending any law or rule necessary to respond to the crisis. Mayors at both the city and county level have similar authorities pursuant to Tennessee Code Annotated § 58-2-110. However, there is often little limitation on what constitutes an emergency or what is related to the emergency situation. This could lead to overly broad restrictions that are seemingly unrelated to the emergency. For example, Michigan’s Gov. Whitmer came under fire for arbitrary and inconsistent proclamations and micro-managing the state’s economy, where buying lottery tickets in-person was allowed but buying gardening

seeds or cans of paint were not.<sup>1</sup> Or take Kentucky Gov. Bershear, who ordered state police to record license plates of those who attended religious services, even requiring that for drive-in style gatherings, vehicles needed to remain six feet apart.<sup>2</sup> Emergency powers should be narrow and specifically tailored to the crisis at hand. On a similar note, while the governor may waive and suspend existing statutes and rules during states of emergency, regulatory agencies at both the state and local level also have the ability to promulgate emergency rules and orders under the threat of criminal penalties. In Tennessee, any violation of a state promulgated rule under the executive branch's emergency powers is a Class A misdemeanor; a violation of a county health order is a Class C misdemeanor.<sup>3</sup> These broad statutes grant unelected bureaucrats the ability to create an unlimited amount of orders with criminal penalties without any legislative input.

### **Recommendation:**

Ensure that the governor and mayors' emergency powers are limited, specific, and relevant to the crisis at hand; and remove or limit the ability of state and local regulatory agencies to create new criminal penalties without legislative approval.

## **TEMPORARY AND WITH LEGISLATIVE OVERSIGHT**

Emergency powers are vested with governors and mayors in order to provide them the flexibility to quickly respond to unforeseen emergencies, rather than the legislature, which is more deliberative by nature. Meanwhile, the General Assembly is only in session for a few months out of the year, making the legislature ill-suited to rapid responses, as crises pay no attention to the calendar. However, the state legislature and local city councils and county commissions have a critical role to play in oversight and empowering longer-term actions by the executive branch. For example, many states require legislative approval for governors to extend emergency declarations. In fact, according to the Council of State Governments, 14 states require gubernatorial executive orders to follow administrative procedure acts or otherwise make them subject to legislative review.<sup>4</sup> Of these 14, the majority allow a governor to declare a state of emergency for only 15 to 30 days at a time before some sort of extension, usually requiring legislative approval after the first extension. However, Tennessee is not one of the states that has either check on executive power. While statewide emergency declarations in Tennessee can only be declared for an initial 60 days, the governor has the sole power to issue extensions thereof. A check on this executive power is not atypical, as even the president as the commander in chief must obtain Congressional approval for military actions lasting longer

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1. Paul Egan, "Whitmer's new stay at home order blasted by critics for lack of consistency," *Detroit Free Press*. April 10, 2020. <https://www.freep.com/story/news/local/michigan/detroit/2020/04/10/whitmer-stay-home-michigan-lottery/5129316002/>.

2. Matthew Glowicki, "Louisville police officers to record license plate numbers of Easter weekend churchgoers." *Louisville Courier Journal*. April 10, 2020. <https://www.courier-journal.com/story/news/2020/04/10/louisville-coronavirus-lmpd-record-easter-churchgoers-license-plates/5133851002/>.

3. Tenn. Code Ann. §58-2-120 and §68-2-602.

4. Heather Perkins, "Book of the States 2019, Chapter 4: State Executive Branch." *The Council of State Governments*. September 19, 2019. <http://knowledgecenter.csg.org/kc/content/book-states-2019-chapter-4-state-executive-branch>.

than 60 days consistent with the War Powers Resolution.<sup>5</sup> Putting some type of time limit on emergency powers before requiring legislative oversight would still give governors and mayors the flexibility to quickly respond to any crisis, while ensuring the legislative branch has the ability to provide input. Such time restrictions could even give the governor flexibility to issue one extension to give time for the legislature to convene a special session to perform its oversight function.

### **Recommendation:**

Require legislative approval for the extension of executive orders issued during a state of emergency after a set period of time.

## **TRANSPARENCY AND REPORTING**

The legislature's power of the purse is perhaps its greatest check over executive authority. Article 2, Section 24 of the Tennessee Constitution grants the General Assembly the power to appropriate all state funds. In order to prepare for any emergencies, the intent of the General Assembly is to adequately fund the Tennessee Emergency Management Agency (TEMA). However, the governor may use funds from other sources, including the state's "Rainy Day Fund" if he or she finds it necessary.<sup>6</sup> While most states do give the executive similar flexibility to adequately respond to emergencies, other states place reporting requirements or more specific guardrails around crisis spending. Hawaii has perhaps the most specific requirements, allowing governors to spend up to \$10 million to immediately respond to any disaster or emergency before seeking additional appropriations from the legislature. Additionally, the Hawaii governor must report the purpose of the expenditure to the legislature within 60 days.<sup>7</sup> The Tennessee General Assembly's Joint Government Operations and Fiscal Review committees continue to meet when the legislature is out of session at regular intervals and could serve as venues for legislative oversight over the executive branch during emergency declarations. This back-end reporting method would also serve to bring transparency and accountability at a time when large amounts of funds are being received from the federal government and spent in a quick fashion by states.

### **Recommendation:**

Require some level of reporting by the executive branch on actions taken and funds spent under an emergency declaration.

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5. "H.J.Res. 542 — 93rd Congress: War Powers Resolution." www.GovTrack.us. 1973. August 6, 2020. <https://www.govtrack.us/congress/bills/93/hjres542>.

6. Tenn. Code Ann. §58-2-109.

7. Haw. Rev. Stat. §127A-16.

# CONCLUSION

The current Coronavirus pandemic and the recent tornadoes in both Middle Tennessee and Chattanooga have brought executive emergency powers to the forefront like never before. As the head of the executive branch, governors and mayors are best positioned to lead state and local response efforts and quickly muster and coordinate resources to respond to such crises, be they pandemics or natural disasters. However, as other states such as Kentucky and Michigan have shown us, a lack of input by the legislative branch can create not only abuses of power, but arbitrary and ineffective restrictions on freedom and personal liberty. By taking these lessons and amending Tennessee's emergency powers to ensure they are limited and specific, temporary, and subject to oversight and reporting requirements, we can ensure Tennessee remains the freest state, while still being adequately prepared for the next crisis we face.

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