



FORUM

The Unconstitutionality of California's State of Emergency

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On March 4, 2020, California Governor Gavin Newsom relied on the California Emergency Services Act to declare a state of emergency as a result of the outbreak of COVID-19. On October 17, 2022, Newsom announced that “the COVID-19 State of Emergency will end on February 28, 2023.” The termination date was set for 103 days after it was declared. I argue that the four month long gap between declaration and termination violates the intended parameters of the California Emergency Services Act.

The California Emergency Services Act grants the governor to extensive and essentially unchecked power. It declares:

During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter.

The law makes clear that “the Governor shall proclaim the termination of a state of emergency *at the earliest possible date that conditions warrant*” (emphasis added). While the law does not spell out the circumstances during which the termination of the state of emergency becomes necessary, the law appears to be tailored to an immediate termination, not a forward-looking one.

It is impossible to know anything about the “conditions” of the future and whether they will meet expectations. This is especially true for pandemics, which

are especially unpredictable in their patterns; no one knows exactly what it will look like in one month from now, let alone four. If Governor Newsom is confident enough to discuss the termination and give it a date, perhaps that earliest possible date is already upon us. If he was truly unsure, then he would not have put a time stamp on it.

Moreover, Governor Newsom's actions have made it clear that the circumstances today are vastly different than those of March 2020. Of the 596 pandemic-era executive orders Governor Newsom signed, just 27 still stand. If he truly believed that an emergency existed with as much conviction as he did in 2020, he would not have ended 95% of his emergency orders. He has even said as much himself. When revoking the state's Stay-At-Home order in June 2021, Newsom wrote that "the effective actions of Californians over the past fifteen months have *successfully curbed the spread of COVID-19*, resulting in dramatically lower disease prevalence and death" (emphasis added). It was already clear from Newsom's decision to terminate 95% of his pandemic-era executive orders that the "earliest possible moment" to end the state of emergency has long since passed. Now his words add to the case as well.

In 2021, The Orange County Board of Education and the Children's Health Defense filed a lawsuit against Governor Newsom, asking the courts to order the Governor to bring an end to California's state of emergency on the grounds that the "earliest possible moment" to lift it, as designated by state statute, had passed. After lifting almost 90% of his COVID-19 related executive orders and removing the state's stay-at-home order, the plaintiffs argued that Newsom had no right to continue exercising lawmaking authority that would, under normal circumstances, be vested in the legislative branch. Their case for the immediate termination of the state of emergency is even stronger now that the governor has made it crystal clear that he can already see the light at the end of the tunnel.

Leaders of other states – even ones politically aligned with California – support near-immediate terminations of pandemic-related states of emergency. In New York, Governor Cuomo announced on June 23, 2021 that "the state of emergency will expire after Thursday, June 24." In a similar move, Governor Carney of Delaware declared on March 1, 2022, that the state of emergency would end that day.

Even New Jersey, which was not as clear cut as the two above examples, trends toward near-immediate termination. On June 4, 2021, Governor Phil Murphy signed legislation ending the COVID-19 Public Health Emergency. This action meant the *immediate termination* of the public health emergency, though it allowed for 30 days for the majority of executive orders issued as a result of the Public Health Emergency to expire. While he provided a short grace period – far less than the

four months Governor Newsom laid out – to undo existing legislation, the emergency itself was immediately undone so that Governor Murphy could no longer pass more executive orders.

Checks and balances are a cornerstone of the American governmental structure. The beauty of checks and balances is that they allow each branch of government to keep the others from overextending their authority. This ensures that the people retain power, as is definitionally required in a democracy. In a state of emergency, this safeguard is *temporarily* removed, because the good that swift and unfettered action can produce in the eye of a hurricane or the height of a pandemic may just outweigh the dangers of an all-powerful executive. That emergency power is not meant to last forever, though. Once it continues past its necessary date, the balance tilts. The dangers of an all-powerful executive outweigh the good that can come from it. Considering precedent in other states and Governor Newsom's own words and actions, the "earliest possible date that conditions warrant" has clearly passed. The courts should exercise their power of judicial review and call for the immediate termination of California's state of emergency. In the words of Robert Tyler, President of Advocates for Faith & Freedom, "our democratic system was never intended to give the Governor the unconscionable authority to hold a death-grip on civil liberties." The courts should do everything in their power to free California from that grip and reinstate the checks and balances that hold our democracy together.