

Democratic Decision Making and Executive Authority in Public Health Emergencies: *Options for North Carolina's COVID-19 Response*

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Overview

North Carolina's response to the COVID-19 outbreak has been largely directed by the state's Democratic governor, Roy Cooper, who issued a state of emergency declaration granting him expanded control of state resources and regulations. Governor Cooper used these powers to issue a series of executive orders that restricted public gatherings and business activity, and mandated public health measures (e.g., social distancing and mask wearing) intended to limit transmission of the virus. However, Governor Cooper's use of executive power has raised concerns among some state Republicans about the scope and permanence of his authority and about the role of the Council of State and the General Assembly in decision-making. North Carolina's use of the Council of State as a check on gubernatorial emergency powers is largely unique both in the United States (US) and internationally. However, diverse domestic and international examples can demonstrate alternate ways in which North Carolina could distribute emergency powers.

Gubernatorial Authority and Emergency Power in North Carolina

North Carolina reported its first confirmed case of COVID-19 on March 3, making it the 15th state to do so. Since, North Carolina has registered 212,909 cases and 3,579 deaths from COVID-19 (as of October 1, 2020).ⁱ On March 10 Governor Cooper issued an executive order declaring a State of Emergency. Within a week, Governor Cooper issued further executive orders prohibiting mass gatherings, mandating social distancing protocols, and orders closing, restaurants, and bars (see Box 1).ⁱⁱ

The North Carolina Emergency Management Act (EMA) grants the Governor of North Carolina broad powers during states of emergency. A recent national review of gubernatorial emergency powers found that North Carolina gave the governor the broadest authority of any state to suspend, amend, and create state regulations and statutes during times of emergency.ⁱⁱⁱ The EMA permits both the governor and the legislature to declare and periodically extend a state of emergency, however only the issuing authority may rescind a state of emergency declaration. The General Assembly has traditionally left emergency declarations to the governor. In his first three years in office, Governor Cooper issued 11 state of emergency declarations. Ten of these responded to natural disasters while one

Box 1: COVID-19 Executive Orders in North Carolina

March 10: State of Emergency declared (E.O. 116)

March 14: Public schools closed and mass gatherings prohibited (E.O. 117)

March 17: Bars and restaurant service restricted (E.O. 118)

March 27: Stay-at-home order closes non-essential businesses (E.O. 121)

April 23: Stay-at-home order and limits on mass gatherings extended (E.O. 135)

May 5: Phase 1 reopening ends "non-essential business" designation and eases restrictions on gatherings (E.O. 138)

May 20: Phase 2 reopening further eases restrictions on businesses and gatherings (E.O. 141) *Extended by E.O. 147 (June 24), E.O. 151 (July 16), and E.O. 155 (August 5)

September 4: Phase 2.5 of reopening maintains closures of bars, theaters, and other entertainment venues (E.O. 163)

Source: NC.gov, COVID-19 Orders

responded to non-weather-related power outages. There is no recent precedent for declaring a state of emergency in response to a public health crisis in North Carolina. However, unlike for hurricanes and other natural disasters, the challenges of COVID-19 underscore a need for more durable policy action in response to public health emergencies.

The EMA grants the governor two sets of powers: those that can be enacted at his or her sole discretion and those that require the concurrence of the North Carolina Council of State (see Box).^{iv} The Council of State, which consists of the 10 independently-elected statewide officials, is a largely unique structure among state governments in the US. Most states do provide for the direct election of other members of the executive branch. However, the number of statewide elected officials in North Carolina (10) is twice the national average (5) and more than all states except North Dakota (11). No other state grants specific power to these officials in the case of emergency or provides for them to be a check on gubernatorial power in such a case.

The Council's role traditionally has been restricted to approving the sale of state property, and votes by the Council are rarely controversial. However, its prescribed role in the EMA has propelled the Council to a more central role during the COVID-19 crisis. Governor Cooper initially sought concurrence from the Council for executive orders, in accordance with the EMA. However, as he encountered resistance from the Council's Republican majority, Cooper began to bypass it entirely. Both sides acknowledge that there is ambiguity in the EMA around the governor's ability to act unilaterally under a state of emergency, with many Republicans wanting to clarify and reaffirm the role of the Council of State.

Governor Cooper's exclusion of the Council of State from decision making in the state's COVID-19 response has been a central criticism of both Republican councilmembers and conservatives statewide. They emphasize the consent power of the Council as a legally-enshrined check on gubernatorial authority. On the other hand, Governor Cooper's defenders point out that this power is a significant expansion of the Council's traditional role and that most councilmembers were not elected to oversee the response to a public health emergency nor possess any specific qualifications to do so.

Box 2: Summary of Gubernatorial Emergency Powers in North Carolina

At the discretion of the Governor

1. Mobilize or redirect state resources and personnel for emergency response
2. Direct law enforcement to ensure compliance with new orders and regulations
3. Relieve any public official of their responsibilities
4. Install public utilities and take other measures to qualify for federal government assistance
5. Wave requirements for environmental permits for state highway construction

With concurrence of the Council of State

1. Compel evacuation and control movement within an emergency area
2. Establish economic controls over all resources, materials, and services
3. Regulate the flow of vehicular and pedestrian traffic and congregation in public places or buildings
4. Waive a provision of any regulation or ordinance of a state agency or a political subdivision
5. Exercise any powers necessary to ensure public safety and security
6. Appoint or remove an executive head of any state agency or institution
7. Seize and utilize materials and facilities for emergency management

Source: NC General Statutes, Chapter 166A–19.30

Alternative Models of Decision Making for Public Health Emergencies

Decision making around COVID-19 has largely centered around three specific issues: (1) restrictions on movement and gatherings, (2) closure of public places and private businesses, and (3) required use of personal protective equipment (e.g., masks). Domestic and international examples present a variety of different structures and systems of checks that have governed the COVID-19 response and how decisions around these issues are made. These examples can broadly be classified into three typologies.

1. *Centralization of decision-making power with the governor or other chief executive.* Ultimate authority rests with the chief executive, although he or she may delegate to or consult closely with an appointed official (e.g., Secretary of Health and Human Services) who is accountable to them.
2. *Deconcentration of decision-making power among various actors at the state level.* This may entail the division of powers—or checks on power—between the executive and legislative branches of government or among elected officials within the executive branch.
3. *Devolution of decision-making power to lower levels of government.* Power to create and implement policies and programs rests with lower-level elected government officials, such as those at the county or city level, and cannot be superseded at the state or national level.

Centralization of decision-making power with the governor or other chief executive

States generally acknowledge governors' critical role in responding to state emergency situations. The justification behind strong executive emergency power is the need for swift and decisive action to protect the residents' health and safety. To this end, some states allow their governors to take immediate action, unhindered by legislative delay, by removing legal barriers to implementation of crucial policies. Governors with this type of strong, centralized authority are using it to limit mass gatherings, require social distancing protocols, and close businesses and schools.^v

The H1N1 crisis provides historical precedent for using strong executive emergency powers at the gubernatorial level during a public health crisis. To increase access to vaccinations during the H1N1 response, the governor of New York enacted emergency powers to allow additional medical practitioners to administer H1N1 and seasonal influenza vaccines. Other states did not allow for governors to establish this practice without legislative approval, which arguably resulted in delays in critical disease prevention measures. Given the severity and ongoing nature of the COVID-19 global pandemic, many governors have cited the need to avoid such delays as justification for the use of their executive powers.

Governor Baker's Use of the Massachusetts's Civil Defense Act

Massachusetts provides its governor with broad emergency powers with limited legislative oversight. In response to COVID-19, Governor Charlie Baker declared a state of emergency invoking the state's Civil Defense Act. This has allowed the governor to take actions such as limiting public gatherings, enacting stay-at-home orders, and closing schools and businesses.^{vi} Massachusetts-based health organizations, including the Massachusetts Hospital Association, the Massachusetts Medical Society, and the Organization of Nurse Leaders, have supported these executive orders.^{vii} While health professionals have generally supported strong executive action to protect the public's health, there remains contention that in bypassing the legislature, the Governor is circumventing the democratic process. The New Civil Liberties Alliance (NCLA) responded to Governor Baker's actions with a lawsuit claiming that the Governor should not have invoked the Civil Defense Act to justify executive actions taken to shut down businesses and mandate quarantines. The NCLA also supported more legislative control over such

actions, arguing that Governor Baker “[violated] the separation of powers to shut down businesses and make other unilateral decisions without legislative approval during the pandemic.”^{viii} Critics also contend that several closures of non-essential businesses, as well as mask mandates—are an infringement on Massachusetts residents’ civil liberties.

Executive Power under Michigan’s Emergency Powers of the Governor Act

Michigan also grants its governor strong executive authority during a state of emergency. The Emergency Powers of the Governor Act (EPGA) of 1945 permits the governor to declare a state of emergency in times of great public crisis, disaster, or rioting. The law specifically gives the Governor the power to enact “reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control.” Michigan’s Governor Whitmer has issued over 160 executive orders since first declaring a state of emergency on March 10.^{ix} These executive orders have included closing K-12 schools and restaurants, banning large gatherings, requiring protective masks in public, and enacting stay-at-home orders. However, Governor Whitmer’s executive orders have come under heavy scrutiny. State Republicans have sought to rescind the EPGA to prevent her from issuing unilateral COVID-19 restrictions.^x They have called attention to a discrepancy between the EPGA and a 1976 law that includes a requirement that the legislature approves states of emergency after 28 days. The EPGA does not include this stipulation.

Centralization of Decision-Making Power in International COVID-19 Responses

Strong centralized decision-making authority has also characterized many internationally COVID-19 responses internationally. In New Zealand and South Korea, strong central leadership has played a key role in the COVID-19 response. New Zealand’s Prime Minister, Jacinda Ardern, has significant power to create and enact public health policies. This included a nation-wide lockdown in the country of five million in the early stages of the response, but also a city-wide lockdown in Auckland in August after a resurgence in community transmission. South Korea, with more than 50 million people, has strong regional health structures, but its decision making is largely done at the central level. South Korea’s strategy has focused on aggressive testing, isolation, and quarantine measures, with the use of isolation dorms for moderate cases and mandatory self-isolation for international arrivals. By relying instead on these measures, South Korea avoided the type of national lock-down implemented in many other countries.^{xi}

Deconcentration of decision-making power among various actors at the state level

In contrast to the examples above, many states and countries have a deconcentrated model of decision-making power in emergency responses. This model takes on a variety of different forms. New Hampshire has an Executive Council, which is the most similar example within the US to North Carolina’s Council of State. However, the role of New Hampshire’s Executive Council is more limited. It has veto power over nominations, pardons, and contracts and serves as a watchdog for state expenditure, but otherwise has no role in policymaking and no check on executive policy action during emergencies.^{xii} The five members of the council are directly elected by geographic region and have no other official responsibility (e.g., as a department or agency head) within the executive branch.

France also has a unique executive body that offers a check on executive (i.e., presidential) power. The French Council of State plays a legal advisory role for the French government, including acting as its highest administrative court, and is comprised of department heads and other non-elected government executives. The Council of State has upheld decisions requiring citizens to wear masks.^{xiii} It has also banned the usage of government COVID-19 monitoring by drone.^{xiv} These actions are taken in its role

as the high court, as it has the authority to rule on the legality of executive actions, a role which has given it a central role in the COVID-19 response.

Rather than a deconcentration of power within the executive branch, most states provide for the legislature to act as a check on executive action during emergency situations. In some cases, the legislature has the unique power to issue and enact a state of emergency. In others, the legislature has either the sole power to extend a state of emergency or the approval of the legislature is required before the executive branch can do so. Lastly, some legislatures can terminate a state of emergency without concurrence from the governor or other chief executive.

Legislative Ratification of State of Emergency Declarations

While governors hold the power to declare states of emergency in each state within the US, there are a few states in which the legislatures have the power to approve or reject emergency declarations. In Georgia, the legislature holds the power to check gubernatorial powers at the outset. State code details that, in conjunction with the declaration of a state of emergency, the governor must convene a special session of the General Assembly within two days to approve or reject the measure.^{xv} Giving the legislature the authority to approve or reject any state of emergency declaration provides an automatic check on gubernatorial power. In response to President Trump's national emergency declaration on March 13, Governor Brian Kemp called for a special session of the General Assembly. A state of emergency was ratified by a joint resolution from both chambers of the Assembly.^{xvi} Governor Kemp has since requested extensions of the state of emergency at monthly intervals. To date, the legislature has approved each extension, and has not exercised its check on gubernatorial authority. As of August 31, 2020, Georgia's state of emergency in response to the coronavirus was extended and will last through October 10.

Expiration and Renewal of States of Emergency

While relatively few states require legislatures to ratify initial state of emergency declarations, more states designate a role for legislatures in extending or renewing a state of emergency. In these cases, there is typically a fixed time period after which a state of emergency either automatically expires or explicitly requires legislative approval to be extended. In total, seven US states have such stipulations.^{xvii} This model is also common in European parliamentary democracies.

In Wisconsin, the legislature must decide whether to continue a state of emergency no later than 60 days after it is declared by the governor.^{xviii} Governor Tony Evers signed an executive order in March, declaring a Public Health State of Emergency. In Wisconsin, the emergency powers afforded to the governor include the ability to activate the state's National Guard, compel state agencies to assist in response, restrict business operations, and mobilize evacuation routes.^{xix} Wisconsin's original state of emergency expired in May, at which time the legislature took no action to renew. In a move that brought legal criticism, Governor Evers issued another executive order in July, declaring a second Public Health State of Emergency. Critics cite the statute legislative review of states of emergency in arguing that the executive office has overextended its powers in a second declaration without a legislative resolution.^{xx} The power of state legislatures to approve extensions of states of emergency, if enacted and enforceable, provide for the legislature to have a say in emergency declarations and the expansion of gubernatorial authority that they entail.^{xxi}

Many of the European parliamentary systems also require legislative bodies to extend emergency declarations beyond a fixed period. Spain and Italy, two of the countries most acutely affected by COVID-19, are examples of this. In both countries, the prime minister initially declared a state of emergency—in Italy on January 31 and in Spain on March 14. In Italy, the initial state of emergency was

valid for six months but was extended by parliament on July 28, at the request of Prime Minister Giuseppe Conte, until October 15.^{xxii} In Spain, a national state of emergency declaration is only valid for two weeks and must be extended by parliament thereafter.^{xxiii} Prime Minister Pedro Sanchez enacted the state emergency to implement and enforce a national lockdown. The state of emergency and lockdown were periodically extended by Prime Minister Sanchez, with parliamentary approval, until June 21.^{xxiv}

Legislative Authority to Terminate a State of Emergency

A third example of how states deconcentrate emergency powers and give the legislature a check on gubernatorial authority is by granting the legislature the power to terminate states of emergencies at their discretion. In Maryland, the General Assembly may file a joint resolution at any time and effectively end the state of emergency.^{xxv} The governor may terminate the state of emergency prior to legislative action, but according to law, the legislature do not require the governor's approval to do so. States of emergency expire 30 days after first declaration, at which time they must be renewed by the governor.^{xxvi}

When the first cases of COVID-19 appeared in the state, on March 5, Governor Larry Hogan declared a state of emergency.^{xxvii} A state of emergency declaration grants the governor the authority to: distribute or use supplies, equipment, and facilities designated to be used in states of emergencies; order evacuations from and movement within areas affected by emergency; and suspend statutes, rules, or regulations of a state agency or subdivision. To date, the legislature has not issued any votes to terminate the state of emergency. However, legislative leaders did form a bipartisan working group at the onset of the virus's spread in Maryland to provide oversight to the state response. As of September, the governor has renewed the state of emergency seven times.^{xxviii}

Devolution of decision-making power to lower levels of government

Within the US federal system, states are the primary sub-national unit of government and have substantial autonomy in policymaking, often comparable to that of national governments. However, county and city governments have minimal autonomy. The so-called "Dillon Rule" stipulates that local governments only hold those powers explicitly granted to them by the state government.^{xxix} In emergency situations, this means that any responsibilities typically resting with local governments can be centralized quickly at the state level and that local policy decisions can be easily overruled. North Carolina's COVID-19 response demonstrates these limitations on local authority. When the state has imposed restrictions on business operations or mass gatherings, local governments can enforce stricter measures but must comply with the state guidelines as a minimum. Although the autonomy of US states in policymaking and implementation—and subsequent variation of COVID-related restrictions at the state level—is already a prime example of the devolution process, there are relatively few state examples of COVID-19 responses in which key emergency responsibilities were devolved to local governments.

As in the US, in most international contexts, devolution of emergency power is from the national to the state or subnational governments and does not extend to the local level. In Germany, the authority to impose and lift lockdowns and other restrictions rests primarily with the country's 16 federal states. While the initial response to COVID-19 was led by the federal government, within two months most decision making was delegated to the state level.^{xxx} Within the state governments—which mirror the parliamentary system of the federal government—the premiers (state prime ministers) wield significant power to enact and enforce these measures.^{xxxi} However, there has been close coordination between the premiers and Prime Minister Angela Merkel in setting and enforcing significant restrictions nationally. In late August, in response to a resurgence in the number of new cases, Prime Minister Merkel and the

state governments came to an agreement to extend a ban on mass gatherings and impose fines on those who do not comply with mask-wearing guidelines.^{xxxii}

Japan also has a heavily devolved system for managing public health crises. The governors of the country's 47 prefectures have significant authority to enforce restrictions on suspected or identified cases of COVID-19.^{xxxiii} However, because it is a novel disease, former President Abe had the authority to centralize many of these powers. Outside of this, the government has limited authority to enact or enforce broad lockdowns. Public officials have instead relied on a practice of public shaming—including the publication of a list of noncompliant businesses—to induce adherence.

Conclusions and Considerations for Potential Reform

In evaluating potential alternative decision-making arrangements, it is important to weigh concerns about gubernatorial overreach against the need to allow for a swift and agile emergency response. COVID-19 has presented a unique challenge beyond the scope and severity of previous states of emergency in North Carolina. This is a situation for which no state, including North Carolina, was fully prepared and reliance on existing laws and prior precedent may be inadequate to address current policy challenges. At the same time, the scope and duration of the actions required to address the current emergency necessarily raise concerns about state overreach, both during emergency response and in preventive action against future emergencies.

To evaluate democratic and policy-making arrangements for public health crises, politicians and policymakers should consider:

- What will the health impacts be of potential delays caused by a more extensive system of checks and balances in enacting emergency measures (e.g., restrictions on movement, gatherings, and businesses)?
- What is the rationale for a centralized response versus a more localized one? Could certain decisions be delegated to the local level or does the action (or inaction) taken in one locality potentially impact others?
- Is there potential for abuse of power? Could emergency powers granted to a governor be used in a self-serving manner, to enact policies beyond the scope of the immediate crisis, or to extend their power beyond their duly elected term?
- What are voters' intentions when electing public officials? Are officials being tasked with the responsibilities that voters intended for them to carry out?
- Whom should voters hold responsible for public health crises and other emergencies, and by what mechanism can they hold them accountable? Is it the governor, the Council of State, or state legislators, and does the frequency of elections (four years vs. two years) matter for accountability?

These five questions can help to frame future discussions around potential revisions to the legal framework for emergency powers and gubernatorial authority both in the state of North Carolina and beyond.

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