# Emergency Powers of the Governor

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**Hannah McCarthy:** [00:00:08] Hi, all. Hannah here.

**Nick Capodice:** [00:00:09] Nick here.

**Hannah McCarthy:** [00:00:10] We hope you're all holding up out there. Here at the show, we've been leaning hard into responding to all of your wants and needs as best we can. And you know, when we first started Civics 101 way back in the day when it was a very different show, it was in part in response to a flood of questions we were getting at the station after the 2016 election.

**Nick Capodice:** [00:00:29] Yeah. And those questions included a lot of can this person do that? Is this addressed in the Constitution? How does that job work anyway? And unsurprisingly, those questions have resurged in a big way in the age of the COVID-19 pandemic.

[00:00:44] John Raby, a history teacher at Thornton Academy in Maine, wanted to know whether governors have the constitutional authority to close their borders as governors across the nation continue to impose restrictive measures to stem the spread of COVID-19. [00:01:00] Is there a chance that one of them will just close the castle gates? And while we're at it, I figured we should understand how governors have the authority to do any of what they're doing right now. So I called up someone who knows.

**Alan Greenblatt:** [00:01:14] My name is Alan Greenblatt. I'm a reporter with Governing where I cover state local government issues.

**Hannah McCarthy:** [00:01:19] Governing is a news site and source on state and local government. Alan also happens to have written a textbook on state and local governance. And before we get to how governors are using their powers right now, let's get the role of governor out of the way.

**Alan Greenblatt:** [00:01:35] Well, governors are, of course, the lead political actors in their states and they set the agenda. So that takes a lot of different forms. It varies by state, of course. But governors generally have the first swing at setting the state budget. They typically set the legislative agenda. In general, they have a lot of appointed powers. They can hire cabinet secretaries [00:02:00] and the like, their commander, chief of the National Guard. And, you know, they can veto legislation and issue line item vetoes of a budget items.

**Nick Capodice:** [00:02:11] All right. So this is not dissimilar from the powers of the president. Right.

**Hannah McCarthy:** [00:02:14] Right. It's the chief executive of a state. Of course, each state has its own constitution, which is why gubernatorial powers will vary from state to state. Gubernatorial, by the way, means relating to a governor.

**Nick Capodice:** [00:02:28] But those formal powers are in times of relative normalcy in which we are currently definitely not.

**Alan Greenblatt:** [00:02:39] Yeah, of course. So I think every state now has an emergency operation center which comes into play, and so there's a certain command and control structure that is ready to go and the governors actually spend a good amount of time rehearsing for emergencies, which is one reason I think governors have stepped up so quickly during this Corona virus crisis.

**Nick Capodice:** [00:02:59] Hold. Hold it. Governors [00:03:00] rehearse for this, like for a play.

**Hannah McCarthy:** [00:03:03] Oh, yeah. Alan says that governors have plans for floods, hurricanes, even terrorist attacks. And they practice. They play out scenarios so that in the event of an actual emergency, they know that their plan could work in the current situation.

**Alan Greenblatt:** [00:03:21] I think every governor has declared a state of emergency.

[00:03:25] Let's just talk about the actual action of signing a merger declaration for a state of emergency in North Dakota.

**Governor montage:** [00:03:32] I am declaring a state of emergency to ensure that we are able to swiftly deploy the personnel and resources necessary to address coronavirus virus and where I have officially declared a declaration of emergency, which gives us certain powers.

[00:03:47] I am now issuing a state of emergency for our state of Alabama.

[00:03:53] I'm signing an executive order declaring a state of emergency in New Hampshire.

**Alan Greenblatt:** [00:03:56] Most of them, if not all of them, have requested a [00:04:00] federal disaster declaration which frees up different federal funds. It varies by state. Some governors are able to unilaterally declare an emergency. I think that's true in New Hampshire. There are other states where the legislature has given the governor emergency powers. For example, Georgia and Kansas, they've enacted legislation giving their governors new emergency powers.

**Nick Capodice:** [00:04:26] Ok. So the governor either has the power to declare an emergency or the legislature gives the governor that power. But this freeing up of federal funds. How does that work?

**Hannah McCarthy:** [00:04:37] Alan's referring to funds distributed by the Federal Emergency Management Agency. That's also called FEMA. If a state makes a disaster or emergency declaration, FEMA can then approve financial assistance for both individuals and communities to apply for. So if you go right now to FEMA.gov/disaster, you will find a list of states that have made that declaration [00:05:00] and whether their dollars have been approved, which at this point is all of them. And FEMA has approved all of them, too.

**Nick Capodice:** [00:05:07] But being in this state of emergency, though, what does it mean practically? It seems that governors are suddenly empowered to take drastic actions like they can shut down businesses and they can shut down schools.

[00:05:18] And before we get to the border stuff, is that legal?

**Alan Greenblatt:** [00:05:25] The powers are broad, so it's not specified. The governor may shut schools, they shut. Businesses may do this. Some things are specify, but basically it says any actions relevant to the public health and safety. So basically they have broad authority. So, you know, it's going to vary by the statute and probably by the court how expansive the powers are and what they can get away with. I mean, so far what we've seen is a move toward greater and greater restrictions.

**Hannah McCarthy:** [00:05:56] So basically, if it's done in the name of health and safety, [00:06:00] it can be done.

[00:06:02] But a state or a governor can always have their orders challenged in court.

**Alan Greenblatt:** [00:06:06] And your state, New Hampshire, there was a lawsuit last month challenging the governor's authority, whether he had the ability to limit large gatherings and therefore protests and things like that. And a judge ruled that it was within his authority.

[00:06:20] He could go under soon and you could shut down those large gatherings, given the emergency powers grading to the governor by by the state.

**Nick Capodice:** [00:06:28] All right. Well, while we're on the topic of New Hampshire, though, that makes me wonder how a governor chooses what to limit or shut down public schools, restaurants, of course. I get it. But in our state, for some reason, golf courses can stay open. What's up with that?

**Alan Greenblatt:** [00:06:43] I think, you know, if you're a governor, you are, of course, also concerned about the economy. Let's see arguments. They always bring up. They don't want to shut things down too fast or too much.

**Nick Capodice:** [00:06:56] But let's get on to John's big question, because ordering [00:07:00] businesses and schools to be shut down, asking residents to stay at home unless they need to pick up essentials, that's not the same thing as shutting down your border. Like on the national level, the border between Canada and the US is currently except for trade shut down. Nobody's going in or out either way.

**Hannah McCarthy:** [00:07:17] Right. And there are a number of things to consider when it comes to the constitutionality of shutting down state borders. I mean, first of all, it's unprecedented in the history of the United States. And several Supreme Court cases have referenced the privileges and immunities clause of the Constitution. That is the one that prevents states from discriminating against the rights of people from other states. And the Articles of Confederation and determined that we have a constitutional right to travel between states, the Articles of Confederation, they drag that thing out of the closet. They sure did. And then there's the fact that it's Congress who has the constitutional power to regulate interstate commerce, something that would certainly [00:08:00] be affected by a border closure. So it's also a question of who would shut down a state border. Would it be the state? Would it be Congress? Would it be the president?

**Alan Greenblatt:** [00:08:11] I don't know that we could have a national quarantine or shutdown order. The way we've had statewide stay at home borders.

**Hannah McCarthy:** [00:08:21] Alan basically said that this is a tricky question to answer. As you know, Nick, our most constitutionality questions and we should note in terms of constitutionality, that's something that a court would have to decide in the event of a challenge. So right now, the furthest that states have gone is mandatory quarantine orders.

**Alan Greenblatt:** [00:08:42] Rhode Island said that they were going to stop and ask for self isolation from people with New York license plates for fear that New Yorkers were spreading the disease. And Governor Cuomo, the governor of New York, complained, and Governor Raimondo, the governor of Rhode Island, [00:09:00] seemed to back off. And then she said, well, we're not going to single out New Yorkers were going to stop people with any out-of-state license plates. This has been a big concern. A lot of New England states and other places that have summer homes or vacation homes have been very wary about people coming in. I'm not sure that they could actually stop them. I haven't seen any state that's actually stopped people from coming in. What they've said, some of the southwestern states, for instance, are asking for people from New York or New Jersey or Connecticut to self-quarantine for 14 days. They're not blocking entry, but they're just putting this kind of public health provision on entering the state.

**Hannah McCarthy:** [00:09:40] And as far as a border closure order coming from somewhere else?

**Donald Trump:** [00:09:44] If you are from the New York metropolitan area and you travel elsewhere, we need you to self-quarantine for 14 days to help us contain the spread of the virus. I am now considering we'll make [00:10:00] a decision very quickly, very shortly, a quarantine because it's such a hot area of New York, New Jersey and Connecticut, we'll be announcing that one way or the other fairly soon.

**Nick Capodice:** [00:10:16] There already was a federal quarantine order?

**Hannah McCarthy:** [00:10:19] Nope.

**Andrew Cuomo:** [00:10:20] I've been speaking to the president. This is would be a declaration of war on states. A federal declaration of war.

**Hannah McCarthy:** [00:10:28] That was Governor Andrew Cuomo of New York. He basically said, I'm pretty sure that isn't legal at all. And it's a total violation of the constitution. And the president backed off immediately. The general consensus among constitutional experts right now is that even if a state border closure could happen, it could be ruled constitutional. A shutdown like that is so opposed to American ideals. It's just really highly unlikely to happen.

**Nick Capodice:** [00:10:56] You know, Hannah, this question is reminding me an awful [00:11:00] lot of a certain philosophical principle of which you are inordinately fond.

**Hannah McCarthy:** [00:11:04] Is it? Go on.

**Nick Capodice:** [00:11:05] This is federalism, right? This dance over the division of power between the states and the federal government. And even in this pandemic, cities and towns and individual citizens.

**Hannah McCarthy:** [00:11:17] Exactly. The president pushing buttons, the state pushing back. And the same is going on at the local level. Governors are giving orders. And cities, towns and people are pushing back. Like that lawsuit against the New Hampshire governor Chris Sununu that he ended up winning. I should mention, though, that it's just like how federal law beats state law. State law beats local regulation. If a city says close that beach. But the state says, nope, all beaches are open, that beach stays open.

**Nick Capodice:** [00:11:50] While we're talking federalism. I have just one last question. What are the chances that the strong powers claimed by governors in this time will [00:12:00] set a big precedent for even more strong gubernatorial powers later on, even after the pandemic is quieted?

**Alan Greenblatt:** [00:12:06] It's always possible once, once any political office when this presidency or the governorship gets new powers, they tend not to give it back. In this case, these emergency orders apply to certain timeframe of the legislature set a date or there's a time relevant to what HHS, the Federal Health and Human Services Department, has said.

[00:12:30] These powers won't last forever. So of course, it's possible there's a precedent. My guess is we won't really see too much of it that everyone recognizes that this is a true emergency. This is not a fake fake emergency. This is a true public health crisis.

**Nick Capodice:** [00:12:49] So like in all walks, we just keep our eyes on the horizon of normal life.

**Hannah McCarthy:** [00:12:53] In the meantime, maybe we can take some comfort in the fact that federalism persists even in the face [00:13:00] of crisis. And this is something that Alan actually pointed out just before we hopped off the video call.

**Alan Greenblatt:** [00:13:05] So you had different states respond differently, but you certainly had many states respond more aggressively than the federal government did, at least at the start. And so in the way our federal system may have been a blessing, if you had just one authority in charge and it chose to do nothing or do little. We'd be in worse shape than we are.

**Hannah McCarthy:** [00:13:26] State autonomy can mean strength and proactivity and innovation, and it can also mean disparities in the services and resources available to people just based on where they live. We're still those 50 little sovereigns in a single union.

**Governor montage:** [00:13:43] Connecticut's going to beat this virus by sticking together and sticking to the rules.

[00:13:47] Restrictions that I put in place were in order to require everybody flying back into Rhode Island from any domestic location to be quarantined for 14 [00:14:00] days.

[00:14:00] You for everything you're doing to ensure the health, safety and well-being of children all across Pennsylvania.

[00:14:07] We will get my priorities. Your governor is making sure that every Alabamian has access to accurate up to date information about about COVID-19, so that you can make decisions that will keep you and your family safely.

[00:14:22] Silver lining is beginning, just beginning to emerge in Colorado. The data is telling us the thanks to the actions we've taken and you've taken, we're starting to make progress.

[00:14:31] I want to encourage my fellow Georgians to hang in there. I know that you're tired of this. I know you want to return to business as usual, but we must first overcome the obstacles that we have in our path.

**Hannah McCarthy:** [00:14:48] Thanks to Alan Greenblatt for stepping in on very short notice to school, [00:15:00] me and gubernatorial emergency powers, among other things, you can find loads of coverage on state and local government in the time of Corona at governing.com, this episode was produced by me Hannah McCarthy with you, Nick Capodice and help from Jackie Fulton.

**Nick Capodice:** [00:15:13] Erika Janik is our executive producer and has issued an executive order to take a nap for once, for crying out loud.

**Hannah McCarthy:** [00:15:19] Maureen McMurry has shut down the borders between imagination and podcasting.

**Nick Capodice:** [00:15:23] Music in this episode by Blue Dot Sessions, Broke for Free and our friend Chris Zabriskie.

**Hannah McCarthy:** [00:15:28] Do you need a quickie episode on something that's been bugging you during this strange time, during any time, really? You can at us on Twitter, we're @civics101pod or submit a question at our web site.

[00:15:39] Civics101podcast.org.

**Nick Capodice:** [00:15:39] Civic 101 is production of NHPR, New Hampshire Public Radio.

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