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Rethinking Emergency Powers in Oklahoma

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In the ancient Roman Republic, in times of emergency, yearly-elected consuls and the Senate could select a dictator, who was given nearly unlimited powers to accomplish a very limited mission within six months.¹ An Oklahoma governor can retain emergency power indefinitely. Now that the Covid-19 panic has finally subsided, and cooler heads can prevail, we can and should not only evaluate the wisdom of our governments' responses to Covid-19, but also improve our emergency institutions so that over-reactions, when they happen, are limited in duration.

Emergency powers are necessary, but they are fraught with danger, something the Founders of our republic recognized in government in general. History would prove the founders correct in both respects. For example, after a particularly grueling war, a young European soldier returned home outraged at the losses his country was suffering. With the economy in shambles, he quickly built a political base, rising to power through the normal political process. Then, using a fire in a government building as a pretext, the former soldier used fear and instability to justify invoking emergency power, curtailing most civil liberties within the country.

Thus did Hitler gain full control of Germany. His use of emergency power serves as a blunt illustration of the dangers of emergency executive powers. On the other hand, there are situations when inaction is not an option. Choosing to evacuate a farm and flood it in order to save a town is a terrible choice, but it is better than letting both the farm and the town flood. Emergency powers should exist, but checks and balances must still be maintained. Oklahoma was fortunate in 2020; our governor felt a duty to remain grounded and restrained in implementing his emergency powers. But our laws should be written to ensure that even if a budding totalitarian is governor, the damage that can be inflicted on us and our institutions will be limited.

In an emergency, Oklahoma's governor is granted broad powers.² The list, which is long, includes the following: "Make, amend, and rescind the necessary orders and rules to carry out the provisions of the Oklahoma Emergency Management Act..." "direction and control of... the conduct of civilians and the movement of and cessation of movement of pedestrians

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and vehicular traffic during, prior and subsequent to natural and man-made disasters and emergencies, public meetings or gatherings, and the evacuation and reception of the civil population..." and, "To remove from office any public officer having administrative responsibilities under this act for willful failure to obey any order, rule or regulation adopted pursuant to this act."³

At least three aspects of Oklahoma's emergency powers statutes stand out as needing reevaluation and reform. 1) There is no clear definition of emergency, nor any meaningful time limit on the assumption of emergency powers; 2) Cities are allowed to set up tyrannical fiefdoms with no recourse; and 3) Governments have not been made to feel the fiscal weight of their policy decisions.

Defining an Emergency and Limiting Its Duration

Oklahoma stands out among its neighbors when it comes to gubernatorial emergency powers. Oklahoma has no time limit on an emergency declaration.⁴ Kansas rewrote its emergency powers laws in March of 2021, after spending much of 2020 under some form of lockdown or mask mandate; it now has some of the most robust protections in the country. With the exception of Missouri, every state bordering Oklahoma has a time limit on emergency declarations. In Kansas, it is 15 days, and can only be renewed once by the legislature, for an additional 30-day term.⁵ Oklahoma's emergency powers allow the Governor to modify or suspend laws and regulations indefinitely.

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An emergency is not merely a serious situation, but a serious situation where disaster is likely unless immediate action is taken. Since an emergency is necessarily short-lived, emergency powers ought to be similarly short-lived. There is no reason a governor should have heightened quasi-legislative powers of indefinite duration. One week ought to be enough time for the legislature to convene and come to a consensus on the next step. If they are unwilling to do so, then perhaps the situation is not a true emergency. If the governor's plan is a good one, it should be easy enough to convince a majority of legislators to ratify and codify it. If it is a bad one, then even a hastily constructed legislative compromise is likely to be better.

Oklahoma's Emergency Management Act defines an emergency so broadly as to be meaningless.

*"Emergency" means any occasion or instance for which, in the determination of the President of the United States or the Governor of the State of Oklahoma, federal or state assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert threat of a catastrophe in any part of the state.*⁶

In other words, an emergency is whatever the President or the Governor declares it to be. Under that definition, anything from banning cars, to making tobacco illegal, to ending oil production could be justified on the grounds that it could "lessen threat of a catastrophe" in some part of the state. The definition presumes both the goodwill and good judgment of the Governor. It does not require that the Governor consider less restrictive alternatives. Nor does it force the Governor to consider the tradeoffs - some lives would undoubtedly be saved if no one were allowed to drive, but the long term consequences of such a policy would mean far more people would die of poverty.

The legislature has the power to end an emergency declaration, by joint resolution of both houses.⁷ However, political incentives make it unlikely that legislators would do so. Once the ordinary rule of law was restored, legislators would be responsible for taking over management of the so-called emergency. Being one of a multi-member body navigating a trying state-wide crisis is difficult and thankless, with little in the way of political upside. Each legislator gets only a fraction of the credit for success, while failure could be enough to unseat many members.

Still, the legislature is the proper body to oversee and expressly authorize action needed to guide the state through a crisis lasting more than a few days. If legislators cannot be trusted to vote down an emergency in times of crisis, then there should be a pre-existing time limit on emergency powers.

Recommendation

In a perfect world, the legislature would precisely define events that rise to the level of "emergency." But if the legislature could foresee events with that level of precision, they would be able to make laws for exactly what to do in each scenario, and no emergency powers would be needed. In reality, a list of potential emergencies is likely to be both over- and under-inclusive, meaning that some things on the list could occur without being true emergencies, and things the legislature never dreamed of might come to pass.

A definition should be broad enough to cover real emergencies, but not as broad as "whatever the governor says." Any definition

ought to refer to the purpose of the state government, found in the preamble to the Oklahoma Constitution. It should also include language indicating a need for immediate action. This action includes preparation or preventative measures, but should not allow declaration of an emergency to anticipate speculative harms days, weeks, or months before there is anything practical to be done.

Additionally, the total duration of the emergency declaration should be given a definite time limit. Seven days should be enough. If the legislature wants to extend those emergency powers for two additional weeks, there may be some contingency which could justify that action. But one extension for a given emergency should be plenty. The legislature should have to take over after a total of three weeks. If the governor has done well, the legislature can vote to continue his policies, assuming those policies lie within the constitutional powers of the legislature. If the governor's policies exceed the legislature's powers, those policies should be ended immediately and automatically upon the conclusion of the first and only 14 day extension.

Local Governments

The bulk of Covid-19 related restrictions in Oklahoma came not from the state, but from cities and towns, and even school districts. While the state forced so-called non-essential businesses to close for three weeks, from March 24 to April 15, cities enacted longer lockdowns, mask mandates that lasted for months, and some public school districts shut their doors for a full year.⁸

Recommendation

The solution here is simple. If the governor declares a statewide emergency, a city should not be able to enact measures more burdensome than those the Governor has implemented unless the Governor gives the city express permission. To be very precise, the city should have to seek and obtain permission from the Governor for the specific measures the city seeks to implement. This reflects the reality that the needs of Tulsa and Oklahoma City might be different from the needs of Ada, but prevents city governments from implementing radical policy shifts under the guise of an emergency.

Fiscal Repercussions

Governments at all levels have cut people off from their livelihoods, and have not paid the consequences for doing so. The United States Constitution requires a government to compensate the owner when it takes property for the public good.⁹ Oklahoma's constitution has a similar provision.¹⁰ These rights have been held to include restitution for a total deprivation of economic value due to burdensome regulations. While the scope of property rights has not been extended to include a job or business (as opposed to the physical property where the job or business is located) the principles involved are very much the same.

When the greater good demands destroying someone's livelihood, the greater population should bear that cost. It isn't right that the owner of a parcel should bear the cost of the road a city wants to build. Nor is it right that the owner of a gym should bear the whole cost when fear drives politicians to outlaw gyms for the better part of a year. While it may be true that some gyms

would have gone out of business due to declined interest, changes in markets are dramatically different from changes forced on the market by heavy handed government actors.

Giving government actors skin in the game would help them better weigh the risks and rewards of a given policy. Right now their incentive is to be overly cautious. This is especially true when both online and traditional media act as though there is a single unanimously agreed solution, and brand anyone who questions it an irresponsible irrational denier of Science.

Standing by while the federal government cuts checks to everyone who makes less than six figures may placate voters, but it does not meet the high standard of fair compensation to those who have been forced to give up much so that society can accomplish a little. Worse, states gave enlarged unemployment checks, tantamount to a crack dealer giving out the first taste free.

Recommendations

Ideally, the state should create a mechanism by which business owners and employees can apply to receive full compensation for the harms they suffered under state and city policies. The funds for this should come directly from the government entity's budget, starting with the salaries of those who enacted the regulations at issue. This puts policymakers in the same position of those they want to regulate. If the sacrifice is really worth it, those policymakers should be happy to share in it.

Barring full compensation, government employees should share in the pain of the regulation. This could be accomplished in several ways. The government's employees could be put on mandatory furloughs until the government lets businesses reopen. Furlough pay could never be recovered. Alternatively, government workers who can safely do so may be allowed to

Structural protections must be put in place so that even the wrong leaders will be incentivized to make the right decisions.

continue working, but at a greatly reduced salary. The lowest salary for a full-time government employee in the state would be a good baseline. Either of these policies would create a class of political insiders with a vested interest in keeping private businesses of the state and cities open for whatever business is available.

Conclusion

Oklahoma was lucky in 2020. Despite major flaws in our emergency procedures, we were among the lightest-hit by the secondary effects of Covid-19. But this happened only because our statewide leaders made better choices than leaders in most other states when it came to the biggest decisions. We can't rely solely on the wisdom and goodwill of elected officials. We must ensure that what happened in other states can never happen to Oklahoma. Structural protections must be put in place so that even the wrong leaders will be incentivized to make the right decisions. This means enacting a tight limit on the amount of time an emergency can be declared to exist, limiting local governments' scope of action to declared emergencies, and forcing government officials to feel the pain of their decisions when they negatively affect the general populace.

End Notes



- 1 Bonner, Robert J. "Emergency Government in Rome and Athens." *The Classical Journal* 18, no. 3 (1922): 144-52. Accessed July 7, 2021. <http://www.jstor.org/stable/3289221>.
- 2 Oklahoma Emergency Management Act of 2003, 63 O.S. 683 et. Seq. <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=99687>.
- 3 63 O.S. 683.8, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=99695>.
- 63 O.S. 683.9, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=99696>.
- 4 The Governor's initial declaration can last up to 30 days, but the legislature may extend that declaration for up to 45 days an unlimited number of times.
- 5 *scoring emergency executive power in all 50 states*, Main Policy Institute, January 2021, <https://mainepolicy.org/project/emergency-powers/>.
- 6 63 O.S. 683.3 <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=99689>.
- 7 63 O.S. 683.9, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=99696>.
- 8 Oklahoma Fourth Amended Executive Order 2020-07, <https://www.sos.ok.gov/documents/executive/1919.pdf>.
See e.g. Oklahoma City, Oklahoma, *Shelter In Place Order*, March 28, 2020; City of Tulsa, Oklahoma, *Executive Order No. 2021-3*, April 28, 2021 (amending orders starting in March 2020), <https://www.cityoftulsa.org/media/16348/2021-03.pdf>; City of Norman, Oklahoma, *Mayor's Emergency Proclamation 2020-2*, https://www.normanok.gov/sites/default/files/documents/2020-10/2020-03-16_emergency_proclamation.pdf.
- 9 U.S. Constitution, Amendment V
- 10 Oklahoma Constitution, Article II, §24 .