

# LIMITS ON EMERGENCY EXECUTIVE POWERS IN RHODE ISLAND

## Legal Analysis by the Flanders Legal Center for Freedom

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The Rhode Island General Laws vest the Governor with awesome power and flexibility to address the emergency needs created by a disaster. Those powers, however, are neither unlimited nor intended to be exercised with unbridled discretion. The statute dealing with emergency powers ends with an express command:

This chapter shall be construed liberally, but those charged with the exercise or enforcement of its great powers are directed to act with restraint and moderation and with strict regard to the rights of the people. (RI Gen. Laws §§ 30-15-19)

This paper examines whether the Governor of Rhode Island, in dealing with the 2020 coronavirus pandemic through executive orders, has acted with proper restraint and within constitutional boundaries. Key takeaways from our analysis, include:

- The Governor must adhere to clearly defined time limitations when she declares a state of emergency and issues related executive orders.
- The General Assembly has the power to override such declarations and force an immediate end to states of emergency.
- The Governor may have exceeded her legal authority to issue proclamations extending beyond enumerated time limits:
  - Was the Governor's declaration to prohibit mid-to-large-sized public and private events through most of the summer within the scope of her emergency powers?
  - Did the Governor illegally order the delay of the 2020 Presidential Primary, its rescheduling, and its suspension of voter-ID laws to implement a mail-ballot-only voting system?
- The arbitrary shut-down of many industry and business sectors may constitute "government takings", subject to just compensation by the state.

- Civil liberties, including religious rights, the right to peaceably assemble, the right to earn an honest living, and the right to travel, may have been violated.

## Why This Analysis Is Important

Rhode Island was recently ranked as the second worst state in the nation for imposing harsh policies and restrictions in response to the pandemic.<sup>1</sup> As a result, Ocean Staters are suffering from the most unemployment claims as a share of its employment base than any other state.<sup>2</sup> And astoundingly, more Rhode Island workers have filed for jobless benefits than have not.<sup>3</sup> These tragic results are occurring at a time when the pandemic's peak has already passed in our state.

Across the country, businesses and organizations are filing lawsuits, challenging certain state-imposed restrictions on travel, business, and personal freedom as unconstitutional, either by creating arbitrary and disparate economic devastation, or by infringing on constitutional rights. As the U.S. Supreme Court has previously ruled, "Neither the legislature nor any executive or judicial officer may disregard the provisions of the constitution in case of emergency" (*Ex parte Milligan*, 71 U.S. 2). In short, the Governor cannot use the pandemic as an excuse to suspend constitutional rights.

In a memorandum entitled, "Balancing Public Safety with the Preservation of Civil Rights," U.S. Attorney General William Barr has publicly indicated that his Department of Justice is prepared to support lawsuits filed against overzealous government actions that unduly restrict commerce or civil liberties in the fight against COVID-19.

For the overall well-being of our state, both medically and economically, serious consideration should be given as to whether the Governor's executive powers should be checked via the legislative process or by the courts.

## Emergency Power General Limitations

Rhode Island General Laws §§ 30-15-7 and 30-15-9 vest the Governor with awesome power and flexibility to address

<sup>1</sup> Adam McCann. "States with the Fewest Coronavirus Restrictions." *WalletHub*. May 5, 2020. [wallethub.com/edu/states-with-the-fewest-coronavirus-restrictions/73818/](https://wallethub.com/edu/states-with-the-fewest-coronavirus-restrictions/73818/)

<sup>2</sup> Patrick Anderson. "R.I. a standout in processing unemployment claims." *Providence Journal*. May 4, 2020. [www.providencejournal.com/news/20200504/ri-standout-in-processing-unemployment-claims](https://www.providencejournal.com/news/20200504/ri-standout-in-processing-unemployment-claims)

<sup>3</sup> "Most Devastating Number: More RI Workers Have Filed for Jobless Benefits than Haven't." *GoLocalProv*. May 2, 2020. [www.golocalprov.com/news/most-devastating-number-more-ri-workers-have-filed-for-benefits-than-are-working](https://www.golocalprov.com/news/most-devastating-number-more-ri-workers-have-filed-for-benefits-than-are-working)

the emergency needs created by a disaster. See, e.g., RI Gen. Laws § 30-15-7(7) (empowering the governor to “[d]o all other things necessary to ensure adequate preparation for disasters in the state, not inconsistent with other provisions of law.”); See also RI Gen. Laws § 30-15-9(e)(1) to 30-15-9(e)(16) (authorizing, among other things, suspension of “the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, provided that the suspension of any statute, order, rule or regulation will be limited in duration and scope to the emergency action requiring said suspension” [§ 30-15-9(e)(1)], power to “control ingress and egress to and from a high risk area, the movement of persons within the area, and the occupancy of premises therein” [§ 30-15-9(e)(7)], and power to “do all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law [§ 30-15-9(e)(13)].

## Specific Limitations and Checks

Despite this broad grant of authority, a close review of the statute reveals both structural and substantive limitations on the scope of the Governor's authority built into the statutory scheme of the Rhode Island Emergency Management Act (EMA; RI Gen. Laws § 30-15-1, et. Seq). While the initial authority to declare a disaster is vested in the Governor, the General Assembly included two important procedural checks on that gubernatorial authority: legal time constraints and General Assembly override.

### Legal Time Constraints

The Governor's authority to issue disaster declarations is limited to thirty days at a time, subject to renewal. RI General Laws § 30-15-9(b) provides in pertinent part:

A state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent. The state of disaster emergency shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty (30) days unless renewed by the governor.

The Governor issued Executive Order 20-02 for a Declaration of Disaster Emergency on March 9, 2020. It was subse-

quently extended, as the law allows, on April 8, by Executive Order 20-18 and on May 6 by Executive Order 20-31. There is no apparent limitation as to how often the Governor may extend emergency declarations or related executive orders.

In limiting the governor's disaster declarations to 30 days at a time, the legislature sought to balance the need to provide sufficient flexibility in the operation of government, in order to meet the exigencies created by the disaster, with the recognition that citizens have an ongoing interest in the normal operation of our democratic institutions and the laws they create. Among other things, these laws and institutions help to protect the rights of the people from an overbearing executive branch and help to create the conditions for human flourishing through the market based economy.

### General Assembly Can Override Declarations

The Governor's powers of disaster declarations are not unchecked. The law retains the power in the General Assembly to unilaterally end a disaster declaration.

... The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency. (RI Gen. Laws § 30-15-9(b))

At least through the second week of May, at the time of this writing, the Rhode Island General Assembly has refused to re-convene and bear responsibility for their constitutional and statutory authority.

## A Judicial Role?

Equally as important as the procedural checks, the law also provides for substantive limits on the executive authority it confers. Despite the broad grant of authority, the use of the

### RECOMMENDATION:

*General Assembly leadership should put in place specific measures to review on an ongoing basis whether any future extension of a state of emergency by the Governor should be overridden and ended.*

emergency powers contained in the EMA are expressly limited “in scope and duration as is reasonably necessary for emergency response” (RI Gen. Laws § 30-15-9(e)).

Although the statute does not define either the meaning of the term “reasonably necessary” or who is to make the determination, given the failsafe the legislature reserved to itself to end a disaster declaration by concurrent resolution, such limiting language suggests, at a minimum, that the judiciary may be called upon to determine whether specific executive actions exceed either the limitation that the action be reasonably necessary or that it not be of excessive duration.

Moreover, the legislature also provided an aid in construing the statute by specifying that the EMA “shall be construed liberally, but those charged with the exercise or enforcement of its great powers are directed to act with restraint and moderation and with strict regard to the *rights of the people* (emphasis by authors),” per RI Gen. Laws § 30-15-19. This again suggests that the legislature envisioned some judicial role in enforcing the limitations built into the statute.

## Gubernatorial Authority to Shut Down Events Through the Summer

The 30-day limitation also reflects a desire on the part of the legislature to impose a degree of humility as to what the future may hold on chief executives eager to make energetic use of the powers to reshape state law and its economy.

Thus, while it would have been appropriate for the governor to suggest that, unless things improve, she may feel compelled to renew a prohibition on large groups in future extensions of a disaster declaration, blanket declarations that large summer and fall activities — including parades, weddings, open air concerts, and the like, all of which are scheduled to occur months into the future, well past the 30-day limitation — are cancelled, is clearly outside the bounds of her specific authority to be able to legally impose at this time.

Regarding executive orders, it would be sound legal reasoning to conclude that such orders only carry the force of law during a period of a declared state of emergency and that any such order could not be enforceable beyond 30-days when a state of emergency has expired. The Governor, herself, appears to recognize this fact, as she has issued a number of executive orders “extending” prior executive orders, for example, Executive Orders 20-15, 20-23, 20-28, and 20-31.

It is also implicit in RI Gen. Laws § 30-15-9(e) that the Governor’s emergency powers must be “limited in scope and duration,” and thus may legally only pertain to matters within

### QUESTION:

*How could the Governor possibly know in April whether or not the data for Rhode Island will show similar significant downturns in June, July, or August?*

the 30-day state-of-emergency limitations, not extending to matters outside of this limited time window.

It is true that, in April, the Governor did not shut down these traditional economic and culturally vital summer events by executive order, but in making her proclamation, she clearly violated the spirit of the law, as described above, and she violated her own pledge to take data-driven actions.

In many countries, and in many states across America, the rates of COVID-19 infections, hospitalizations, and deaths have taken sharp downturns once the peak period has passed, often within a 30-day period, thereby obviating the need for a continued states of emergency.

If the Governor seeks to unreasonably extend the declared state of emergency, the General Assembly has the authority to impose a more-measured response to the crisis and potentially to save our Ocean State’s vital summer season.

## Legality of Rescheduled Presidential Primary

We apply this same time-scope limitation to the March 23, 2020, Executive Order 20-11, which delayed the April 28 Presidential primary election in Rhode Island to June 2. Both the original date of the primary and the rescheduled date fall beyond the 30-day limitation for emergency powers. Even more objectionable, the March 23 executive order was issued during a period when the Governor’s emergency powers were set to expire just two weeks later, on April 8.

Without legislative approval, it could be argued that this executive order should be vacated and that the 2020 Presidential primaries in Rhode Island should be declared null and void. Given the absentee status of the General Assembly, it is fortunate that the 2020 primary elections in the Ocean State will not be a critical step in the Presidential nominating process, as it is a foregone conclusion about whom the nominees will be from the two major political parties.



Summarizing this section, given the unfavorable comparisons to our sister states and the orders to force small-business retailers to absorb a disproportionate share of the economic devastation, it is suggested that Governor Raimondo, along with the General Assembly leadership who have abdicated their oversight duties have failed to abide by the command to act with “restraint and moderation and with strict regard to the rights of the people” (RI Gen. Laws § 30-15-19).

## OPINION:

*The considered opinion of the authors of this paper is that the Governor, in the cases cited above, has exceeded her emergency powers, opening the state to legal challenges.*

## Other Legal Risks and Issues

In addition to the restrictions on gubernatorial authority outlined above, many additional constitutional limitations should factor into any decision to extend COVID-19-related restrictions and that could be challenged in court.

### Separation of Powers

Although it is obvious that the legislature intended to provide the executive with substantial flexibility to meet the needs of an unidentified threat, in allowing the Governor the awesome power to suspend “the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency” (RI Gen. Laws § 30-15-9(e)(1)), the General Assembly may have inadvertently exceeded the scope of permissible legislative delegation in violation of the non-delegation doctrine and the separation of powers. See, e.g., *City of Warwick v. Warwick Regular Firemen’s Association*, 106 R.I. 109, 113, 256 A.2d 206, 209 (1969); see also *Milardo v. Coastal Resources Mgmt. Council*, 434 A. 2d 266 (1981) (“it is the conditions of the delegation — the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse” that determine the constitutionality of a delegation of power). This is a point for further evaluation and consideration as to the constitutionality of the law itself.

### Regulatory Powers

The above-cited provision gives the Governor broad authority to suspend regulations, so that the state might be in a stronger position to respond to a crisis. But it is not clear that the Governor has the power to impose new rules and regulations on private-sector businesses, enforceable by fines or shut-downs, such as she put forth in her most recent May 8 Executive Order 20-32. Many businesses and industry groups throughout America are challenging similar arbitrary state and local rules, especially those that discriminate against “nonessential” businesses.

Further, this Governor’s executive orders also ignore due-process, denying business owners and leaders the right to challenge their designation as “nonessential.”

### Compensation for Government Takings?

These executive orders also raise the question of whether the shutting down of “nonessential businesses” constitutes compensable “takings” under either state or federal law.

Much of the economic harm from the Governor’s stay-at-home orders and orders closing “nonessential” businesses has been focused on Rhode Island’s small and medium-sized businesses, while big-box retailers that have also stocked items found in “nonessential” retailers were permitted to continue to operate. Thus, for example, Target reported a 20 percent increase in same-store sales while mom-and-pop retailers or restaurateurs were shuttered.

A successful takings claim by these mom-and-pop operations could find a basis in either federal or state law. The Fifth Amendment to the United States Constitution prohibits the government from taking private property “for public use, without just compensation” (U.S. Const. Amend. 5).

How has the Governor taken property? Although the Governor has not actually taken title to any properties, the law has long recognized the legal principles of constructive possession and regulatory takings. In essence, “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster.” Certainly, the many small businesses which may be forced to close or file bankruptcy will have a strong argument that the full value of their property has been appropriated for the public good.

The highly technical procedural and substantive requirements for a successful federal takings claim will be outlined in a further analysis by the Flanders Legal Center for Freedom. Suffice it to say for now that legal scholars are split about whether COVID-19-related orders like the ones is-

sued by Governor Raimondo would qualify as takings for purposes of federal law. Although in a class-action case brought early in the COVID-19 crisis response the Pennsylvania Supreme Court rejected a takings claim on the grounds that any such taking was merely temporary, the decision was split. Later developments, including the extended length of the shut-down, distinguish current realities from the situation examined in that case. Although a successful federal takings claim is not assured, there several U.S. Supreme Court precedents support the compensability of temporary regulatory takings. Thus, the specter of takings liability should give pause to any official looking to extend a shut down.

### *Emergency Claims Commission*

In addition to a potential recovery based on federal takings laws, the General Assembly has seen fit to include a special claims provision in the Rhode Island Emergency Management Act. Rhode Island Gen. Laws § 30-15-11 establishes an Emergency Claims Commission to hear takings claims as a result of actions under the EMA. Specifically, the act provides that:

Whenever the governor takes possession of, or title to, any real or personal property pursuant to the provisions of this chapter, he or she shall immediately cause the owner and/or possessor of the property, referred to as the "claimant", to be notified in any manner that the commission provides, and shall also cause a copy of the notice to be filed with the commission." (RI Gen. Laws § 30-15-11(b))

Those who feel they have received insufficient damage awards for their losses are then permitted to appeal to higher courts. To date, insofar as the authors are aware, this section has never been implemented. But this mechanism appears designed to streamline a large number of claims, such as those that would result of the COVID-19 orders.

Although the authors of this report were unable to identify any reported cases dealing with the Emergency Claims Commission, the existence of this provision in the EMA offers the unique potential to quickly address the moral imperative to ensure that the burden of the Governor's closure orders not be borne disproportionately by Rhode Island's entrepreneurs. Nevertheless, despite the statutory mandate for this commission, it is unclear if it has been activated in the wake of the current disaster orders.

## OPINION:

*Once again, the Governor's unilateral and arbitrary actions, without appropriate statutory or legislative authorization, have put Rhode Island at risk of successful litigation challenges.*

## Issues and Questions for Future Analysis

**Right to Assemble.** Do the Governor's arbitrary limitations on the number of people who are permitted to peaceably gather violate our First Amendment rights to assemble?

**Religious Rights.** The Governor's arbitrary limitation of five people at a time in a church is discriminatory and a violation of religious rights, as larger crowds are permissible in other, secular settings. Federal district courts have ruled against similar orders in Kansas and in Louisville, Kentucky.<sup>4</sup>

**Personal Liberty.** Is it constitutional for the state to enforce face-mask mandates among the populace with fines and or imprisonment? The Warwick and North Providence police unions issued statements in early May that they would not ask their members enforce the Governor's unconstitutional executive order in this regard.<sup>5</sup>

**Economic Liberty and Equal Protection.** Is it constitutional for the state to designate certain retailers as "nonessential," while permitting others, often selling similar products, to continue operating?

<sup>4</sup> Hans von Spakovsky. "Governors Can't Suspend the First Amendment." *The Daily Signal*. May 6, 2020. [www.dailysignal.com/2020/05/06/governors-cant-suspend-the-first-amendment/](http://www.dailysignal.com/2020/05/06/governors-cant-suspend-the-first-amendment/)

<sup>5</sup> "UPDATED: Warwick Police Union Issues Blistering Rebuke of Raimondo Mask Order & Enforcement Policy." *GoLocalProv*. May 8, 2020. [www.golocalprov.com/news/breaking-warwick-police-union-issue-blistering-rebuke-of-raimondo-mask-orde](http://www.golocalprov.com/news/breaking-warwick-police-union-issue-blistering-rebuke-of-raimondo-mask-orde)

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**The Flanders Legal Center for Freedom** is an initiative of the RI Center for Freedom & Prosperity, a nonpartisan, 501(c)(3) nonprofit public policy think tank and the state's leading free-enterprise research and advocacy organization. The Center works to make a profound, positive impact on the lives of every family and business in the state through the rigorous exchange of market-based ideas and reform solutions aimed at restoring economic competitiveness, educational opportunities, and ultimately hope for a more prosperous future.

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