The Role of State Attorneys General During a State of Emergency

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**Introduction**

According to the National Conference of State Legislatures’ forecast of the hot policy issues facing legislatures this session, emergency preparedness tops the list: “The hurricanes of 2005 left unprecedented destruction in the Gulf states. They also exposed flaws in disaster response. The governors of Louisiana and Mississippi called special sessions to deal with the crises there in late 2005. Other states will confront disaster readiness this session.”

In most states, once the governor declares a state of emergency, there are few limits on what the governor may do. Those limits that do exist, found in either a state’s legislative code or constitution, are open to differing legal interpretations. There are two obvious partners to and checks on the exercise of emergency powers by the chief executive officer of a state: the state legislature and the courts. However, the state attorney general has proven to be an invaluable cooperative partner to the governor in times of crisis. Equally important, when called for, the state attorney general may be an invaluable bulwark against the exercise of unbridled power by a state’s chief executive officer.

Thus, when state legislatures and governors review their states’ emergency preparations, the vital role of state attorneys general to maintain the rule of law and aid in the effective management of a state-wide or local emergency should be recognized. If states have not allocated this function to their respective attorneys general, new

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2 Due to the limited scope of this paper, the extent to which federal law and the President may act to limit a governor’s exercise of power during a state of emergency will not be addressed. However, such limits exist and cannot be ignored.
legislation, regulations or executive orders should be drawn up in order to maximize the ability of the state to cope during a state of emergency.

Part I of this paper provides examples of state legal regimes which govern the governor’s power to declare a state of emergency and the subsequent exercise of his or her emergency powers. Specifically, this section focuses on the role that the states’ emergency-related statutes, executive orders, and regulations have established for state attorneys general with respect to a state of emergency.

Part II of this paper identifies and provides examples of a few of the ways in which an attorney general can act effectively as a partner to a governor during a state of emergency. Such modes of assistance include, but are not limited to the following: (1) enforcement of anti-price gouging laws and the exertion of investigative pressure; (2) the provision of legal advice to emergency responders (especially prior to the state of emergency); (3) public declarations of support; and (4) regulation of and coordination of charity relief efforts.

Part III of this paper argues that in addition to acting as a partner to a governor in times of crisis, an attorney general endowed with common law powers is the actor most aptly-suited to act as a bulwark against the unlawful exercise of power by a state’s chief executive officer during a state of emergency. This section argues that an attorney general is not only able, but, moreover, he or she is obligated as the chief legal officer of the state to sue the governor in the event that the governor exercises emergency powers in contravention of the laws of the state.

In Part IV of this paper, the following question is posed: Can the attorney general sue the governor during a state of emergency? In essence, this section assesses the
attorney general’s ability to rely on his or her common law powers as authority to sue the governor for unlawful action during a state of emergency.

The conclusion, presented in Part V of this paper, recommends the incorporation of attorneys general into state emergency management plans as an important partner to, and intra-branch check on, the chief executive during a state of emergency.

**Part I: Examples of State Legal Regimes Governing a Governor’s Power to Declare a State of Emergency and Subsequent Exercise of Emergency Powers**

The following survey of state legal regimes governing the power of the governor to declare and preside over a state of emergency demonstrates the existing range of powers and duties assigned to governors vis-à-vis attorneys general as a starting point from which to conceptualize an ideal role for the state attorney general within a state’s emergency preparation and management plan. The examples presented below represent a range of such plans: First, the Arizona legal system is a model which assigns relatively significant powers and duties to its attorney general, primarily, by establishing the attorney general as a voting member of the state emergency council. In contrast, Florida’s emergency statutes do not appear to affirmatively provide any role for its attorney general. The middle ground is represented by California, which only assigns an advisory role to its attorney general by designating him or her as a member of the governor’s emergency advisory body.

**A. Baseline: Arizona**

A recent example of Arizona’s emergency legal regime in action was presented when Governor Janet Napolitano of Arizona took a bold and controversial step to deal

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3 The Arizona state emergency legal scheme is the only one which will be explained in full in order to set out the various contexts in which emergency powers may be implicated. The subsequent snapshot depictions of Florida and California are sufficiently detailed to convey the extent of the governors’ emergency powers despite the absence of a comprehensive account.
with her state’s immigration problems. On August, 15, 2005, Governor Napolitano declared a state of emergency in four counties along the Arizona-Mexico border.⁴

According to the Governor’s declaration, “the massive increase in unauthorized border crossings and the related increase in deaths, crime and property damage justifies the declaration of a State of Emergency.”⁵ She claimed authorization for this act pursuant to § 35-192 of the Arizona Revised Statutes.⁶ Although Governor Napolitano initially earmarked $1.5 million through the Governor’s Emergency Fund, she was limited to the designation of $200,000 until the state emergency council approved her request for the remaining $1.3 million.⁷ Below, I will set out the legal mechanisms at work behind Governor Napolitano’s declaration and subsequent exercise of emergency powers.

According to § 35-192 of the Arizona Revised Statutes, the governor is authorized to declare emergencies and to authorize expenditures related to those emergencies. The emergencies covered by § 35-192 include: (1) invasions, hostile attacks, riots or insurrections; (2) epidemics of disease or plagues of insects; (3) floods or floodwaters; (4) acts of God or any major disaster; and (5) wild land fires.⁸

In addition to the governor, the state emergency council is vested by statute with significant powers and responsibilities. The council consists of 14 members, including the governor, the secretary of state, the attorney general, the director of the division of

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⁵ Id.
⁶ Id.
emergency management, other state officers, agency directors and legislative leaders. In sum, the purpose of the council is to monitor emergencies declared by the governor; to make recommendations to the governor; and to declare emergencies when the governor is unavailable.

By statute, the council is charged with recommending orders, rules, policies and procedures to the governor. Furthermore, the council “shall monitor each emergency declared by the governor and the activities and response of the division [of emergency management] to the emergency” and “recommend to the governor or the legislature,” based on reports submitted by an auditor, “that the emergency conditions have stabilized and that the emergency is substantially contained.”

In addition to its duties, the council also has significant powers. If the governor is unavailable, the council may issue a state of emergency proclamation, under the same conditions by which the governor could do so, provided that it is issued at a meeting called by the director and if at least three members, one of whom is an elected official (e.g. the attorney general), affirm the need for the proclamation. The council also has power over the amount of expenditures the governor may authorize for emergencies. The governor may not incur liabilities in excess of $200,000 for a single disaster without the consent of a majority of the members of the state emergency council.

During a state of emergency, Arizona’s governor has broad powers, including complete authority over all agencies of state government, the right to exercise the police

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power vested in the state by the constitution and laws of Arizona within the area designated, and the power to utilize state agencies and state personnel, equipment and facilities to prevent or alleviate actual and threatened damage.14 During a state of war emergency, the governor may suspend any statute prescribing procedures for conducting state business, or orders or rules of any state agency, in order not to hinder or delay emergency response.15 In addition, during a state of war emergency, the governor may commandeer and utilize any property or personnel deemed necessary in carrying out the responsibilities of his or her office, provided the state pays reasonable compensation.16

With respect to public health, once the governor has declared a state of emergency or state of war emergency, he or she may issue orders to mandate medical exams, ration medicines and vaccines, provide transportation for health care workers and ill people, procure medicines and vaccines, and mandate treatment, vaccination, isolation or quarantine for certain contagious and fatal diseases.17

With respect to the management of prisons and prisoners, Arizona law empowers the director of the department of corrections to declare an emergency due to “acts of God, natural catastrophes, prison riots and overcrowding.”18 The director must notify the governor and the attorney general up to 24 hours before declaring the emergency of his or her intentions to do so and the need to relocate prisoners to another existing public or private facility.19 If the director declares that an emergency exists due to overcrowding, the director must consult with the governor, the attorney general and state legislative

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17 Bea, supra note 12, at 1 (citing Ariz. Rev. Stat. §§ 36-787(B), (C)).
leaders regarding the relocation of inmates from the overcrowded facility to another facility before initiating a transfer.\textsuperscript{20}

After the governor declares a state of war emergency, within 24 hours, his or her powers terminate if the legislature is not in session and the governor has not called for a special session on the subject.\textsuperscript{21} In the event the governor declares a state of emergency, in contrast to a state of war emergency, his or her powers terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature.\textsuperscript{22}

\textbf{B. Snapshot: Florida}

In Florida, the governor is authorized by statute to declare a state of emergency by executive order or proclamation if he or she finds an emergency has occurred or there is an imminent threat of its occurrence.\textsuperscript{23} The state of emergency continues until the governor determines the emergency conditions no longer exist and he or she terminates the state of emergency by executive order or proclamation.\textsuperscript{24} Regardless, no state of emergency may last more than 60 days unless it is renewed by the governor.\textsuperscript{25} Apparently, the legislature is not authorized by statute to declare a state of emergency; however, it may terminate such status at any time by concurrent resolution.\textsuperscript{26}

\textsuperscript{20} Ariz. Rev. Stat. § 41-1609(F).
\textsuperscript{22} Ariz. Rev. Stat. § 26-303(F).
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
During a state of emergency, the governor is authorized to assume direct operational control over all or part of the state emergency management functions.\(^\text{27}\) In addition, the governor is authorized, \textit{inter alia}, to: “suspend provisions of any regulatory statute that would prevent or hinder emergency management; transfer functions and personnel of state agencies; direct or compel the evacuation of threatened areas; limit or suspend utility services; and commandeering or utilize private property.”\(^\text{28}\)

In contrast to the system set up by Arizona, Florida’s emergency legal scheme provides virtually no role for the state’s attorney general. It appears the only explicit reference to the attorney general in Florida’s emergency response statutes is the Florida Mutual Aid Act.\(^\text{29}\) The Mutual Aid Act established a state law enforcement mutual aid plan to provide for the command and coordination of law enforcement planning, operations, and mutual aid, particularly in the event of natural or manmade disasters or emergencies and other major law enforcement problems.\(^\text{30}\) The Act provides that one of the duties of the director of the Mutual Aid Plan is to, “[s]erve as liaison to the Attorney General in order to keep him or her informed of changes in law enforcement plans and regulations, mutual aid agreements, and current developments in all situations from a legal standpoint.”\(^\text{31}\) Thus, it appears Florida’s emergency preparedness plan does not even, by statute, provide for an official advisory role for its attorney general.

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\(^{28}\) Id.


C. Snapshot: California

In California, under the Emergency Services Act, the governor is authorized to issue a declaration of a state of emergency when “conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage . . . which, by reason of their magnitude,” are likely to be beyond the control of local government.32 A state of war emergency, on the other hand, exists immediately, with or without a proclamation by the governor, “whenever [the] state or nation is attacked by an enemy of the United States . . .”.33

When it appears that a state of war emergency will exceed seven days, the governor is required to convene a meeting of the emergency council, an advisory body to the governor, not later than the seventh day.34 The governor’s state of war emergency powers terminate upon any of the following: proclamation of the governor; concurrent resolution of the legislature; failure of the governor to call a meeting of the emergency council within the seven day period; or failure by the governor to issue a call for a special legislative session within 30 days (unless the legislature is already convened).35 In contrast, the governor’s state of emergency powers terminate either by proclamation of the governor or by concurrent resolution of the legislature.36

The Emergency Services Act confers broad powers on the governor to deal with emergencies. These powers include: the authority to suspend statutes, commandeer

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private property and personnel, complete authority over all state agencies, and the right to exercise police power within the designated area or regions. In addition, the governor is authorized to make expenditures “from any fund legally available” to deal with a state of war emergency, state of emergency or local emergency conditions.

The California emergency council, mentioned above, consists of the governor, lieutenant governor, attorney general, representatives of local governments, firefighters, one representative of the American National Red Cross, one representative of the city or county fire services of the state, one representative of the city or county law enforcement services of the state, one representative of a local public health agency, and legislative leaders. The council’s primary role is to advise the governor during a state of emergency; however, the board is required by statute to meet, upon the call of the governor, at least once per year. According to the Emergency Services Act, the duty of the council is “to act as an advisory body to the Governor in times of emergency and with reference thereto in order to minimize the effects of those occurrences by recommending ameliorative action.” Since the council is merely an advisory body, none of the council’s powers go beyond the ability to recommend, evaluate, consider or report. Therefore, it appears the only emergency power granted by statute to the California attorney general is his power, as a member of the California emergency council, to advise the governor. Nonetheless, California’s decision to draw upon the special expertise of its attorney general with respect to emergency planning and response, in contrast to Florida,

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37 Notably, however, “the Governor is not authorized to commandeer any newspaper, newspaper wire service, or radio or television station” during a state of war emergency or state of emergency. Cal. Gov. Code § 8572.
explicitly recognizes the value and importance of the state’s access to its legal counsel both prior to and during a state of emergency.

D. Comparative Summary

The examples of the state emergency statutory schemes in place for Arizona, Florida and California show three variations on how states currently empower their governors during a state of emergency and incorporate (or fail to incorporate) attorneys general into their emergency preparedness plans. Arizona represents a system in which a state has statutorily vested significant emergency powers in its attorney general. Florida, conversely, has not affirmatively provided for, by statute, any special role for its attorney general during a state of emergency. Lastly, California provides an example of the middle ground by its statutory assignment of an advisory function to its attorney general.

It is of great significance to recognize that regardless of a state’s decision to explicitly grant emergency statutory duties and powers to its attorney general, a state’s chief legal officer may have at his or her disposal all of the common law powers inherent to the office. Additionally, in those jurisdictions where the state has by statute or constitution abrogated its attorney general’s common law powers, there still remains a number of methods by which an attorney general may draw upon his or her non-emergency powers to ensure the welfare of the state during a state of emergency. The ability of attorneys general to play a pivotal role during a state of emergency, even in the absence of special emergency statutory authority, will be explored in the next two sections.
Part II: Attorney General as Partner

State attorneys general have proven to be invaluable cooperative partners to the governors of numerous states during the course of preparation and response to a state of emergency. The following examples demonstrate how attorneys general have drawn upon the powers of their office, both statutory and non-statutory, to mitigate the effects of state crises.

A. Anti-Price Gouging Laws and Investigative Pressure

The positive effects of state anti-price gouging statutes and the strategic exercise of prosecutorial discretion on the part of state attorneys general to mitigate the effects of a crisis have been demonstrated repeatedly over time and across the country. Most states have anti-price gouging laws, which, upon a declaration of a state of emergency through proper state or federal channels, limit price increases on essential goods and services. Typically, once a state of emergency has been declared, attorneys general are authorized to investigate and prosecute price gouging activities.43 Such laws can be valuable to ensure a functioning consumer market even in the midst of a state of emergency and to deter unnecessary market disruption by businesses which might otherwise engage in profiteering.

The exertion of heavy investigative pressure on energy suppliers by the California Attorney General and the California State Legislature has been identified as a

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contributing factor to the abatement of California’s recent energy crisis. California’s anti-price gouging statute establishes that upon proclamation of a state of emergency by the President or the governor, and for a period of 30 days following the proclamation, it is unlawful for a person to sell or offer to sell covered goods or services for more than 10% above the price charged by that person for those goods or services immediately prior to the emergency proclamation. The 30 day period can be extended by a local legislative body or the California Legislature, “if deemed necessary to protect the lives, property, or welfare of the citizens.” Furthermore, violation of the law is a criminal offense, punishable by imprisonment for a period of one year or less, a fine of not more than $10,000, or by both fine and imprisonment.

Governor Gray Davis declared a state of emergency on January 17, 2001, after the state was forced by a severe energy shortage to implement rolling blackouts and the cutting of power temporarily for hundreds of thousands of people. According to Governor Davis’ declaration, “the imminent threat of widespread and prolonged disruption of electrical power to California’s emergency services, law enforcement, schools, hospitals, homes, businesses and agriculture constitutes a condition of extreme peril to the safety of persons and property within the state . . .” As a result of the declaration, Attorney General Lockyer was able to initiate investigations and litigation with respect to the widespread price gouging activities of power companies in the region. According to a recent report, the combined value of Attorney General Lockyer’s

46 Cal. Penal Code § 396(e).
47 Cal. Penal Code § 396(f).
settlements with power companies is $6.3 billion, including more than $2.9 billion in cash and ratepayer relief. Furthermore, Attorney General Lockyer’s continued involvement in such litigation will likely result in further gains.

The crisis-abatement value of the attorney general’s strategic exercise of his or her power to bring price-gouging suits was also demonstrated in the aftermath of the September 11th attacks on New York and Washington, D.C. Almost immediately after the attacks, price gouging at gas pumps occurred across the country. Various state attorneys general reacted promptly to the situation, issuing warnings against price gouging to retailers, deploying investigators to hundreds of locations at which price gouging had been reported, and filing complaints against offending entities. According to one report, “The price gouging at gasoline pumps . . . died down in most parts of the country as the authorities cracked down.”

In Michigan, for example, when gas station owners raised prices post-9/11, in some cases to nearly double their pre-attack levels, then-Attorney General Jennifer Granholm immediately listed 50 offending stations, insisted on apologies and refunds for customers, and demanded the payment of fines for violations of the state’s anti-price gouging law. In response, nearly all listed stations complied with the Attorney General’s demands. At least one Michigan gas station, Old Sportsman’s General Store,

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52 Id.
53 Id.
55 Id.
went so far as to apologize in newspaper advertisements and notices on its door for hiking gasoline prices up as high as $3.50 per gallon after the attacks.56

B. Provision of Legal Advice to Emergency Responders

The establishment of communication between state officials who will be on the front line responding to an emergency situation and legal advisors during, and especially prior to, a state of emergency can be crucial in mitigating the effects of a crisis. The authors of an article on infectious diseases proposed that “[p]ublic health officials and lawyers should jointly develop a blueprint responding to outbreaks based upon sound legal principles designed to effectuate both public health flexibility and individual rights.”57

In the early ’90s, prior to a public health crisis, Arizona was faced with the absence of coordination between state officials and the state attorney general. This is notable because Arizona’s attorney general was charged with acting as legal counsel to the state officials. An Arizona epidemiologist faced with a 1993 outbreak of the Hantavirus (a disease characterized by fever, muscle aches and intestinal complaints followed by the abrupt onset of shortness of breath and rapid progression to death) found that this lack of a pre-existing plan rendered the government’s response to the outbreak inefficient and could have contributed to a major disaster.58

In order to avoid such a disaster, the Minnesota Attorney General’s Office prepared legal policy and procedure protocols responding to public health emergencies.59

56 Egan, supra note 51.
58 Id. at 779, 798.
59 Id. at 798
The Attorney General’s Office provided checklists, draft pleadings, up to date legal memoranda and forms, affidavits with attached curriculum vitae on relevant health department personnel, and trial books.60 As a result, when Minnesota’s public health officers need to exercise the sovereign authority of the state, their counsel can use its limited time to focus on the analysis of unforeseen circumstances and facts unique to the emergency situation.61 Such preparedness will clearly facilitate the promptness with which public health officials can respond during a state of emergency.

C. Public Declarations of Support

Most attorneys general are in the unique position of being a part of the state’s executive government, yet they are able to act independently of and even, at times, contrary to the will of their governors, the chief executive officers of the state.62 Since most state attorneys general may speak freely regarding disagreements with their governors, a public statement of support with respect to gubernatorial decisions to declare (or not to declare) a state of emergency can be a powerful legitimizing force. An attorney general can provide such support either informally, through a press conference or press release, or in response to an advisory opinion request. The following examples demonstrate the utility of this tactic.

In September 2005, California Attorney General Bill Lockyer issued a press release, stating that “he would support calls for Governor Arnold Schwarzenegger to declare a state of emergency in California” in response to the gasoline price gouging

60 Id. at 798
61 Id.
62 See William P. Marshall, Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive, 115 Yale L.J. 2446, 2448 (2006) (“In forty-eight states, for example, the Attorney General does not serve at the will of the Governor”).
effects of Hurricane Katrina.\textsuperscript{63} Arguably, this would not have been a controversial move, but any time a state of emergency is declared concerns will spread about the appropriateness of such action. More recently, California Deputy Attorney General Vickie Whitney issued a statement defending Governor Schwarzenegger’s hotly contested move to declare a state of emergency in October 2006. In doing so, Governor Schwarzenegger empowered himself to transfer prisoners out of state in an effort to ease prison overcrowding.\textsuperscript{64} According to a \textit{Sacramento Bee} report, Deputy Attorney General Whitney stated, in defense of the Governor’s action, “The governor needed the ability to act in what is already an emergency . . . and not wait ‘until we have one of the worst prison riots in the history of this country’ . . .”\textsuperscript{65}

In Mississippi, Attorney General Jim Hood legitimized a pledge by the Mayor of Jackson to declare a state of emergency if a spate of violent crime did not subside.\textsuperscript{66} Members of the city council questioned the Mayor’s authority to take such action without the Council’s consent. There can be no doubt, however, that the Mayor’s threat was buttressed when a Mississippi newspaper reported the following: “Last week, Mississippi Attorney General Jim Hood said the mayor has the authority to unilaterally ‘proclaim a civil emergency in writing, based upon certain factual findings of civil unrest.’”\textsuperscript{67} The

\textsuperscript{64} Hudson Sangree, \textit{Prisoner transfers in doubt; Governor’s crisis powers may not apply, judge says}, The Sacramento Bee, Nov. 23, 2006.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} This example does not involve an attorney general’s declaration of support for his or her governor; nonetheless, it demonstrates the legitimizing force which attorney general support can give to executive action.
\textsuperscript{67} Kathleen Baydala, \textit{Melton Mulling New Curfew}, The Clarion-Ledger, June 21, 2006 at 1A.
article continued, “Under state law, he does not need the approval of the governor or the
Jackson City Council to do so, Hood said.”68

When an executive officer of the state, such as a mayor or governor, declares a state of emergency, or threatens to do so, such official is vulnerable to attacks that he or she is engaging in reckless or lawless behavior for the purpose of self-aggrandizement.
In such instances, the attorney general – who due to his role as the state’s chief legal officer, the public expects will have greater legal expertise than the governor69 – can be a powerful ally.

D. Regulation and Coordination of Charity Relief Efforts

The important role that a state attorney general can play in overseeing and coordinating charity relief efforts was most recently demonstrated by the actions of then-New York Attorney General Eliot Spitzer. As attorney general, Spitzer was charged with overseeing charities that solicit funds in New York, as well as charitable organizations, which are created in or hold assets in New York to ensure that the public interest is protected when such funds are raised and spent.70 This duty is common among attorneys general not just during a state of emergency but at all times.

Spitzer’s oversight capacity and experience made him an ideal candidate to effectively coordinate charity relief efforts post-9/11. Spitzer identified a number of critical steps that an attorney general can take to facilitate the provision of relief to victims of a crisis. These steps include the following: (1) make it easier for victims to learn what relief is available and how such relief can be accessed; (2) establish a victims

68 Id.
69 Marshall, supra note 62, at 2454.
database, to facilitate coordination, avoid duplication, and ensure fairness in distribution of aid; and (3) investigate and prosecute instances of charity fraud and abuse as they arise. In addition, Spitzer emphasized the importance of, “ensuring that a working group of charities and victim advocates is established, to solve problems as they arise and swiftly identify gaps in the services required to meet victims’ needs in the future.”

Part III: Common Law Roots of Attorney General’s Office Confers Power and Duty to Act as Bulwark Against Chief Executive Excess

The most powerful and promising avenue for attorneys general to restrain governors from overreaching during a state of emergency is through the courts. State courts have demonstrated a willingness to step in and adjudicate the question of whether a state’s chief executive has exercised power beyond what is authorized by law. This is true even when a governor has acted in the context of a state of emergency. The attorney general’s power to sue the governor for violating the law is rooted in the office’s common law powers and has been explicitly recognized by some state supreme and appellate courts. It must be noted, however, that the availability of this avenue will vary depending on the powers each state has chosen to bestow upon its attorney general.

As explained below, an attorney general endowed with the common law independence of his or her office is the actor best suited to act as a bulwark against the unlawful exercise of power by the state’s chief executive officer in times of crisis. Furthermore, in addition to conferring the power to bring suit against an overreaching governor during a state of emergency, the common law duties of the attorney general’s office mandate that he or she take action in the face of such unlawful activity.

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71 Id.
72 Id.
A. Common Law Power to Act

Most attorneys general are in the unique position of being a part of the state’s executive branch of government, yet they are able to act independently of and even, at times, contrary to the will of the governor, the state’s chief executive officer. The independence of the office finds its roots in ancient common law. As the Court of Appeals for the Fifth Circuit stated, “The office of attorney general is older than the United States . . .”73 Judge Thornberry, writing for the court, continued, “As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion.”74

The office of the attorney general was initially brought over to the colonies modeled after its English counterpart.75 However, at the time of the founding, viewed in the context of this country’s characteristic diffusion of governmental power among officers of the executive and legislative branch, the attorney general’s discretion was considered to be broadened.76 At first, the office of attorney general was generally filled by an appointee of the governor for varying terms of tenure.77 However, over time, many states created independent attorneys general and increased the autonomy of the office by changing it from an appointive to a popularly elected position.78 According to Professor William P. Marshall, in doing so, “the states’ purpose was to weaken the power of a

73 Florida ex rel. Shevin v. Exxon Corp, 526 F.2d 266, 268 (5th Cir. 1976).
74 Id. at 268.
75 Marshall, supra note 62, at 2450.
76 Shevin, 526 F.2d at 268.
77 Marshall, supra note 62, at 2450.
78 Marshall, supra note 62, at 2451.
central chief executive and further an intrabranch system of checks and balances.” As of today, in 48 states the attorney general does not serve at the governor’s pleasure.

Thus, in addition to those powers and duties conferred by state law and constitution, some attorneys general enjoy the common law powers of the office. These powers, such as the right to sue in the name of the public interest, the power of parens patriae, significantly increase an attorney general’s independence from gubernatorial direction.

**B. Common Law Duty to Act**

In virtually all states, the attorney general is the state’s chief legal officer. The common law confers upon the attorney general, as the chief legal officer, the duty to institute, conduct, and maintain all suits and proceedings which he or she deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. The Florida Supreme Court described the attorney general’s obligation as follows: “As the chief law officer of the state, it is his duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time.” Similarly, the Supreme Court of California found that the attorney general, “as the chief law officer of the state, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests.”

79 Id.
80 Marshall, supra note 62, at 2448.
81 Marshall, supra note 62, at 2452
83 State ex rel. Landis v. S. H. Kress & Co., 115 Fla. 189, 200 (Fla. 1934).
84 Pierce v. Superior Court of Los Angeles County, 1 Cal.2d 759, 761-762 (Cal. 1934).
event that a governor unlawfully exercises power, the attorney general not only has the power, but moreover, has the duty to take action (unless his or her common law powers have been statutorily or constitutionally abrogated).

**Part IV: Common Law Powers in Contemporary Courts: Can the Attorney General Sue the Governor during a State of Emergency?**

Even assuming that an attorney general has the common law or statutory authority to independently exercise legal action which he or she deems necessary for the enforcement of the laws of the state, the preservation of order and the protection of public rights and interests, it cannot be further assumed that the attorney general may bring an independent action against the governor – especially during a state of emergency. There does not seem to be any precedent for such action. However, there is precedent which supports the power of the attorney general to sue the governor with respect to matters involving a governor’s exercise of his or her non-emergency powers. Secondly, there is precedent which demonstrates the state courts’ willingness to adjudicate suits against its governor, even during a state of emergency. Thus, there is a basis to conclude that an attorney general has the power to commence a lawsuit against a governor who exercises emergency powers beyond those allocated to him by the constitution or legislature.

**A. Attorney General Can Sue the Governor**

Although it is rare, there have been instances in which a state attorney general has brought suit directly against the governor. For example, in *State ex rel. Condon v. Hodges*, the South Carolina Supreme Court held that the South Carolina Attorney General was not prohibited from bringing a legal action against the Governor. The

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86 But cf. People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981) (“Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law and he
court rejected the argument that a lawyer cannot sue his own client, pointing to the fact that the attorney general occupies a dual role as the governor’s attorney and as the executive official responsible for vindicating wrongs against the citizens of the state.87

Furthermore, the absence of precedent directly on point does not indicate that a future lawsuit brought by an attorney general against his or her governor is unlikely to be successful. There is, in fact, persuasive authority from numerous state courts which support the legitimacy of such action. For example, in People ex rel. Salazar v. Davidson, the Colorado Supreme Court held the Attorney General had the authority to sue the Secretary of State. In that case, Colorado Attorney General Ken Salazar sued Secretary of State Donetta Davidson, seeking an injunction to prevent the implementation of a redistricting plan passed by the general assembly which Salazar deemed unconstitutional. The court rejected Secretary Davidson’s argument that Colorado’s attorney general was limited to those powers expressly spelled out by statute to hold the occupant of the office possessed the common law power to bring suit in order to protect the integrity of the election process.90 Furthermore, the court identified the attorney general as “the appropriate person to institute such an action, because it is the function of the Attorney General . . . to protect the rights of the public. . . .”91 Given the fact that the Colorado Supreme Court gave primacy to Attorney General Salazar’s independent determination to uphold the Colorado Constitution by suing a high-ranking state

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87 Condon at 240.
89 Id. at 1230.
90 Id. at 1229.
91 Id. at 1229 (quoting People v. Tool, 35 Colo. 225, 236 (1905) (internal quotation marks omitted)).
executive official, it is likely the court would uphold the power of the attorney general to bring suit against the governor.

**B. The Governor Can be Sued during a State of Emergency**

Two recent California lawsuits demonstrate that a governor does not have carte blanche once he or she has declared a state of emergency.

In *National Tax-Limitation Committee v. Schwarzenegger*, the California Court of Appeals entertained a suit brought by taxpayers for a writ of mandamus to compel Governor Schwarzenegger to proclaim the termination of a state of emergency. Although the Governor proclaimed an end to the emergency while the case was pending on appeal, the Court of Appeals determined the moot issues to be of continuing public interest and held the following: (1) the Governor could be compelled by a writ of mandamus to terminate a state of emergency proclaimed under the California Emergency Services Act; (2) the separation of powers doctrine did not preclude the court from issuing such a writ; (3) the political question doctrine did not preclude the court from issuing such a writ; and (4) the Governor was not immune under the Act from a writ of mandamus. According to Court of Appeals Judge Robie, “It may be a rare case in which a plaintiff will be able to prove the Governor has unreasonably exercised his discretion in refusing to terminate a state of emergency. Nevertheless, the courthouse door is, and must remain, open to a plaintiff claiming such an abuse of discretion by the Governor.”

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93 *Id.* at 13.
94 *Id.* at 24.
95 *Id.* at 28.
96 *Id.* at 40-41.
97 *Id.* at 3.
There is also a case pending in Sacramento Superior Court, in which labor unions, representing correctional officers and other prison workers, are suing Governor Schwarzenegger for exceeding his emergency powers. The unions argue the Governor exceeded his emergency powers and violated the California Constitution when he decided to send more than 2,000 inmates to private prisons in other states.\textsuperscript{98} Superior Court Judge Gail Ohanesian declined to grant a preliminary injunction to put an immediate stop to the transfer of 2,260 California inmates to privately run prisons in Indiana, Tennessee, Oklahoma and Arizona. However, in her order denying the preliminary injunction request, Judge Ohanesian said there is a good chance the groups will eventually prevail on the merits.\textsuperscript{99} The Judge indicated that the Emergency Services Act, which was intended to apply in catastrophic situations, such as earthquakes and riots, was improperly relied on by the Governor as authorization for his actions.\textsuperscript{100} In addition, she communicated her belief that the inmate-transfer plan violated the California Constitution by establishing contracts with private businesses rather than using its own employees without qualifying for the exception for urgent and temporary situations.\textsuperscript{101} A decision in this case is expected to be issued in February 2007.\textsuperscript{102}

\textit{Part V: Conclusion}

When state legislatures and governors review their states’ emergency preparations, during this session and in the future, the vital role of state attorneys general to maintain the rule of law and aid in the effective management of a state-wide or local emergency should not be ignored. If states have not allocated this function to their

\textsuperscript{98} Sangree, \textit{supra} note 64. \\
\textsuperscript{99} \textit{Id.} \\
\textsuperscript{100} \textit{Id.} \\
\textsuperscript{101} \textit{Id.} \\
\textsuperscript{102} \textit{Id.}
respective attorneys general, new legislation, regulations or executive orders should be drawn up to maximize the ability of the state to cope with a state of emergency.

At a minimum, the attorney general, or a representative of his or her office, should be appointed as a member of some pre-existing and regularly convening panel or commission on emergency preparedness. The attorney general, as a member of such body, will then have the opportunity to effectively contribute to the state’s efforts before and during a state of emergency in both an advisory and coordinating capacity. The attorney general’s ongoing involvement in emergency preparedness discussions will also facilitate the discovery of legal gaps which can be addressed by regulation or statute in advance of a crisis rather than at the moment a state is confronted with a state of emergency.

It is of great significance to recognize that regardless of a state’s decision to explicitly grant emergency statutory duties and powers to its attorney general, the state’s chief legal officer may have at his or her disposal all of the common law powers inherent to the office. Furthermore, in those jurisdictions where the state has by statute or constitution abrogated its attorney general’s common law powers, there still remain numerous ways in which an attorney general may draw upon his or her non-emergency powers to ensure the welfare of the state during a state of emergency. Thus, even in the absence of statutory authority, all attorneys general have the ability to play a pivotal role in the event of a state of emergency.