

Separation of Powers and Emergency Powers

American systems of government were intentionally designed to prevent sovereign powers from concentrating in too few hands. The framers of the U.S. Constitution were guided by Western liberal values informed by the experience of centuries of oppression under despotic rulers in Europe. They knew that a concentration of power could endanger the rights and welfare of all citizens by enabling systematic repression of dissent, upward mobility, or individual rights.

As Thomas Jefferson wisely advised, “The concentrating [of all the powers of government] in the same hands is precisely the definition of despotic government.”¹

The U.S. Constitution therefore requires all new states admitted to the union to adopt a republican form of government to safeguard its citizens and uphold the values of Western liberalism. Nevada’s constitutional framers embraced this charge and crafted some of the strongest provisions in the nation to prevent the concentration of power.

Article 3, Section 1 states: “The powers of the Government of the State of Nevada shall be divided into three separate departments—the Legislative—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.” (Emphases added.)

Key Points

The Nevada constitution does not allow legislators to serve in the executive branch. The state constitution prohibits any person “charged with the exercise of powers” of one branch to “exercise any functions” within another branch. The only caveat is for items “expressly directed or permitted” within the constitution. Lawmakers have routinely violated this constitutional provision and thus endangered the separation of powers principle which is Americans’ primary safeguard against despotic government.

Over the years, dozens of incumbent lawmakers have simultaneously held full-time positions within the executive branch. In some cases, lawmakers have served as law enforcement officers – enforcing the very laws they enacted or have the power to change.

Lawmakers have sometimes disingenuously countered that they don’t exercise “the powers” of the executive branch and therefore don’t violate the separation of powers principle. However, they clearly exercise “the powers” of the legislative branch, and the Nevada Constitution therefore prevents them from fulfilling “any functions” of another branch.²

In Nevada, local governments are political subdivisions of the state. Nevada is a Dillon’s Rule state, which means that it incorporates cities and counties to help carry out public services that could not be provided efficiently at the state level alone. Local governments are not fully autonomous units, but are essentially component units of the state. Therefore, if a person is employed within a branch of local government, that person is effectively employed within the equivalent branch of the state.

Emergency powers circumvent the separation of powers principle and should be limited. NRS Chapter 414 grants the governor the ability to declare an “emergency,” allowing that governor to assume broad, unilateral powers. This

¹Thomas Jefferson, Notes on Virginia. 1782.

²Robert Fellner, “Defending the Constitution: Nevada Policy’s Separation of Powers Lawsuit,” Nevada Policy Research Institute.

includes the ability to “make, amend and rescind ... orders and regulations” toward the civilian population without legislative consent.

While it is conceivable that timely response to an emergency may require a pace of action faster than that with the legislature can deliver, the governor’s unilateral ability to assume these powers should not be open-ended.

Recommendations

Place a time limit on emergency powers. Any emergency declared by the governor should be limited to a matter of days until the legislature can authorize a declaration of emergency, which should require renewal every 90 days.

Refuse to seat lawmakers who violate the constitution. The constitution says the legislature can judge the qualifications of its own members. Violating that constitution should be automatically disqualifying.

Key Provisions of Nevada Emergency Powers Statute

NRS 414.060 Powers and duties of Governor.

1. The Governor is responsible for carrying out the provisions of this chapter, and in the event of an emergency or disaster beyond local control, may assume direct operational control over all or any part of the functions of emergency management within this State.
2. In performing his or her duties under this chapter, the Governor may cooperate with the Federal Government, with other states and with private agencies in all matters pertaining to emergency management in this State and the nation.
3. In performing his or her duties under this chapter and to effect its policy and purpose, the Governor may:
 - (a) Make, amend and rescind the necessary orders and regulations to carry out the provisions of this chapter within the limits of the authority conferred upon the Governor in this chapter, with due consideration of the plans provided by the Federal Government.
 - (b) Prepare a comprehensive state emergency management plan and develop a program for emergency management in this State to be integrated into and coordinated with the plans of the Federal Government and of other states for emergency management to the fullest possible extent, and coordinate the preparation of plans and programs for emergency management by the political subdivisions of this State to be integrated into and coordinated with the plan and program of this State to the fullest possible extent.
 - (c) In accordance with the plan and program for the emergency management in this State, procure supplies and equipment, institute planning, training and exercise programs, carry out public information programs, and take all other preparatory steps, including the partial or full mobilization of organizations for emergency management in advance of an actual emergency or disaster, to ensure the availability of adequately trained and equipped forces in time of need.
 - (d) Make such studies and surveys of industries, resources and facilities in this State as may be necessary to ascertain the capabilities of the State for emergency management and plan for the most efficient use thereof.
 - (e) On behalf of this State, enter into mutual aid agreements with other states and coordinate mutual aid plans between political subdivisions of this State.
 - (f) Delegate any administrative authority vested in him or her under this chapter, and provide for the subdelegation of any such authority.
 - (g) Cooperate with the President of the United States and the heads of the Armed Forces, the agency of the United States for emergency management and other appropriate federal officers and agencies, and with the officers and agencies of other states in matters pertaining to emergency management in the State and nation, including the direction or control of:
 - (1) Mobilizing forces for emergency management and other tests and exercises.
 - (2) Mechanical devices to be used in connection with warnings and signals for emergencies or disasters.
 - (3) The effective screening or extinguishing of all lights and lighting devices and appliances.
 - (4) Coordinating the efforts of all public utilities in terminating and restoring service to the general public during an emergency or disaster.
 - (5) The conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster.
 - (6) Public meetings or gatherings.
 - (7) The evacuation and reception of the general public during an attack or an emergency or disaster.