

POLICY BRIEF

KEY FINDINGS

> **Maine** received an overall score of **51 out of 100 points**, landing tied for the 29th best balance of power between the legislative and executive branches during emergency declarations.

> **Kansas and South Carolina** continue to outperform the rest of the country because, in both states, the governor must earn legislative approval for an emergency declaration to continue beyond the first 15 days. **South Carolina** ranks **1st overall** because the legislature is required to concur with the governor's emergency declaration within 15 days. The legislature also has the power to terminate an emergency declaration at any time.

> **Vermont** earned the lowest score of all states again in part because it allows certain emergency executive orders to remain in effect up to 180 days after an emergency has been terminated.

> **Only one state (Louisiana)** allows emergencies to be terminated with a majority vote of either house.

> **Arizona** and **Virginia** saw the greatest improvement from the last edition of this scorecard. Reform laws passed in both states in 2022 resulted in Arizona's ranking climbing from 49th to tied for 25th, while Virginia improved from tied for 42nd to tied for 17th.

SCORING EMERGENCY EXECUTIVE POWER IN ALL 50 STATES (2023)

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

—James Madison, Federalist Papers No. 47

INTRODUCTION & METHODS

As described in the first edition of this 50-state emergency powers scorecard,^[1] states were not graded on how their governor exercised emergency powers during the COVID-19 pandemic. Rather, this scorecard judges the legal environment under which a governor may exercise executive power during a state of emergency. While some governors' actions (and resulting legislative or judicial action) during the pandemic helped determine a more exact interpretation of various state laws, the purpose of this scorecard was, and continues to be, to provide context and a point of comparison related to the extent of legislative oversight of the executive branch in times of emergency.

To develop each state's score, Maine Policy examined each state's emergency powers statutes to determine the extent of legislative oversight, powers delegated to the chief executive, and the process for initiating or terminating a state of emergency declaration.

Every state received a numerical score between 1 and 20 across five categories for a total score of up to 100 points. The highest

score denotes the most stringent executive powers, allowing for the greatest accountability from the people's branch, the legislature. The lowest score denotes the weakest check on executive powers and the greatest potential threat to liberty.

As the primary focus of this report is the checks and balances on emergency executive authority, the categories which deal with the process of initiating a state of emergency and time limitations on emergency declarations were weighted double in relation to the other three categories: the process of termination, whether a governor's powers persist after official termination, and the ability of the governor to alter statute or regulations during an emergency. It's worth noting, however, that time limits on emergency powers are effectively useless if a governor is the sole judge of whether an emergency exists, as is the case in Hawaii, Vermont, and Washington, among other states.

To provide readers with confidence in the quality of the research, this report includes a public spreadsheet to view each state score by category, as well as the statutes cited for analysis.^[2]

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NOTABLE CHANGES TO STATE EMERGENCY GOVERNANCE IN 2022

In 2022, only two states amended their emergency power laws substantially enough to alter their score in the 2023 50-state emergency powers scorecard: Arizona and Virginia. Lawmakers in both states passed bills dealing with the time limits of states of emergency declared by their governors, considerably raising the score and corresponding overall ranking of both states.

Arizona's SB 1009^[3] specified that governor-declared states of emergency and extensions thereof may not exceed 30 days at a time, and each continuous state of emergency shall terminate after 120 days, unless extended by a concurrent resolution of the legislature. Because of SB 1009, upon termination of a state of emergency, the governor also may not proclaim a new emergency based on the same conditions as the previous emergency without a concurrent resolution. Passage by the Arizona legislature, and the subsequent signature from former Gov. Doug Ducey, raised Arizona's rubric score by 17 points, from 39 to 56 total, bringing the state up from 49th to tied for 25th among all US states. Prior to passage, the length of states of emergencies in Arizona were open ended.

Virginia's HB 158^[4] (also known as SB 4) limited the effect of emergency orders to 45 days after issuance by the governor. It also states that, unless altered by the legislature within the 45-day period, "the Governor shall thereafter be prohibited from issuing the same or a similar rule, regulation, or order relating to the same emergency." Upon passage of HB 158, Virginia's rubric score rose 14 points, from 43 to 57 total. It moved Virginia up in the 50-state rankings from tied for 42nd to tied for 17th.

Changes made to state emergency powers laws were limited in 2022, likely because it was an election year, in which many states have truncated legislative sessions. As the urgency and heightened emotions around the pandemic response fade, and lawmakers from across the political spectrum apply an objective standard by which to judge the powers of their chief exec-

utives, 2023 could be a big year for emergency power reform.

POTENTIAL FOR REFORM

Maine is a state ripe for emergency powers reform in 2023. Two bills dealing with this issue have been submitted by legislators and will be considered later this year. While neither have yet been published and given Legislative Document (LD) numbers by the Revisor of Statutes, discussions with sponsors provided Maine Policy Institute with preliminary text for analysis.

One bill that was drafted by the MPI policy team, "An Act to Restore Balanced Emergency Powers,"^[5] and published in the Maine Policy Legislative Blueprint,^[6] was submitted by Rep. James White (R-Guilford), Sen. Brakey (R-Androscoggin), and Sen. James Libby (R-Cumberland). Because of their similarity, these bills are likely to all be combined by the Revisor of Statutes, the legislative office tasked with drafting and editing proposed bill language, into a single bill.

The MPI model language contains aspects of several bills submitted last session, as well as a ballot initiative proposed by the Libertarian Party of Maine, to alter the law in four major ways:

- Proscribe a 30-day time limit to any Civil State of Emergency; in the event an emergency expires, the governor may not proclaim another "that is substantially similar to one that expired... without approval of the Legislature."
- On the 20th day after an emergency proclamation, the governor must convene the Legislature and earn a 2/3rds vote of each house in order to extend the emergency. Legislators may terminate or amend any specific emergency order with a majority vote in each chamber.
- All emergency orders which curtail constitutional rights must be "narrowly tailored to serve a compelling health or safety purpose," issued by the chief executive, and legal challenges to which must be given expedited judicial review.

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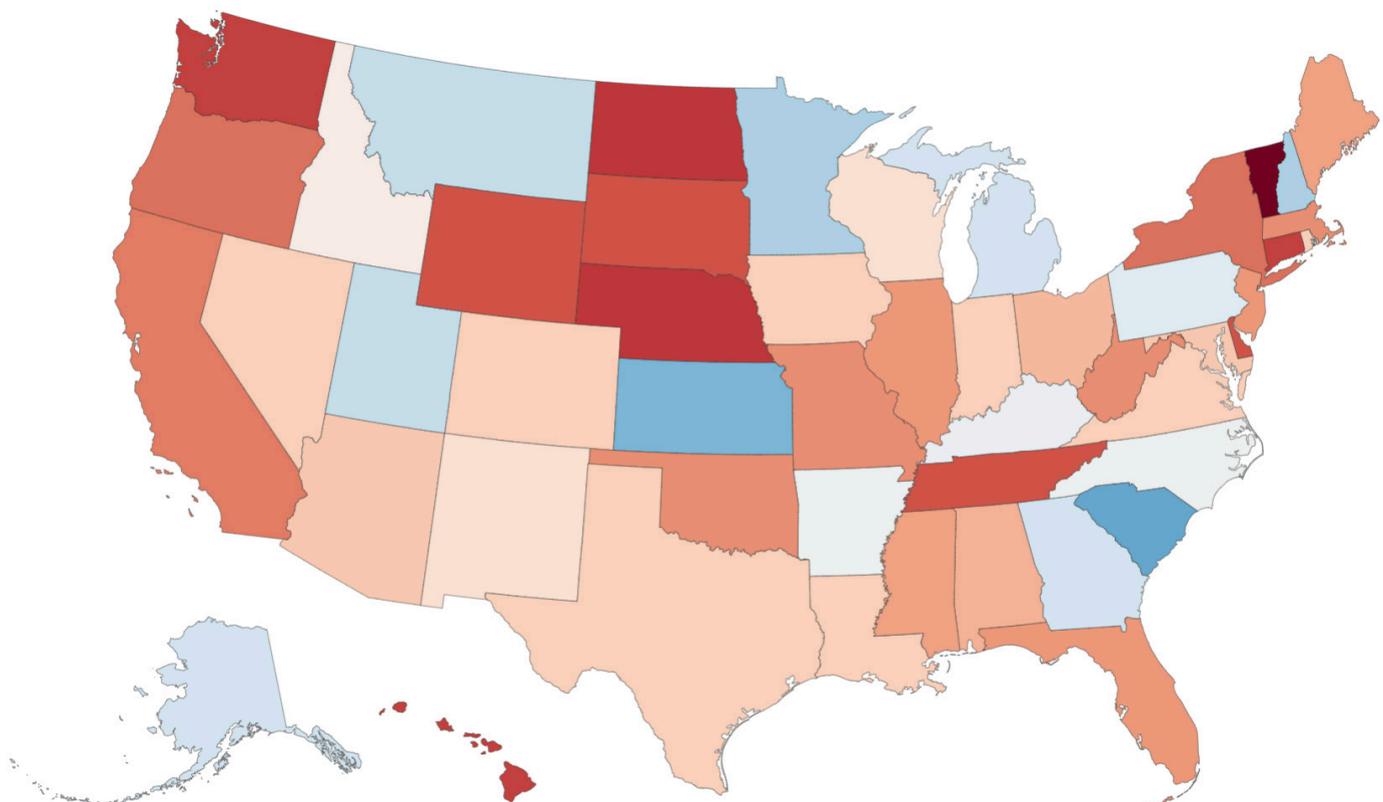
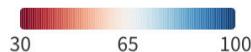
The bill would also specify that emergency action by the governor “be applied to the smallest political subdivision possible” and specify that statewide orders, as well as those that would “have a substantial impact on the operation of businesses,” or “directly result in the temporary or permanent closure of any business or civic or religious organization” be approved by 2/3 of the membership of the Legislative Council, a group of 10 lawmakers including the presiding officers, and the majority and minority party caucus leaders from each chamber.

The other bill, “An Act to Enhance Legislative Participation in the Use of Emergency Powers,” was submitted by Rep. Adam R. Lee (D-Auburn) would require the governor to be “in direct consultation with the Legislative Council,” in order to exercise emergency powers, and also require her to “narrowly tailor such actions” to address the emergency “while limiting the extent to which they deviate from the actions that would be permissible in the absence of a declared emergency.” Lee’s bill would also give Maine Superior Court jurisdiction over challenges to emergency orders and require appeals made by the governor to be expedited in the Maine Supreme Judicial Court.

Lawmakers in Maine and around the US should review their chief executive’s powers under emergency declarations, and the extent to which the legislature may balance those powers, especially in circumstances where amorphous threats allow for prolonged declarations of an “emergency.” Review the status of emergency powers laws in all 50 states in 2023 via the map and below.

Emergency Powers Checks & Balances Scorecard 2023

Highest score given to the greatest safeguards of liberty via legislative counterbalance to the governor



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State	Score	Rank	State	Score	Rank
Alabama	53	28	Montana	73	T5
Alaska	71	T7	Nebraska	40	T48
Arizona	56	T25	Nevada	57	T17
Arkansas	66	T12	New Hampshire	76	T3
California	47	38	New Jersey	50	T31
Colorado	57	T17	New Mexico	60	T15
Connecticut	41	T45	New York	46	T39
Delaware	43	T41	North Carolina	66	T12
Florida	50	T31	North Dakota	40	T48
Georgia	71	T7	Ohio	54	27
Hawaii	41	T45	Oklahoma	49	T34
Idaho	63	14	Oregon	46	T39
Illinois	50	T31	Pennsylvania	69	10
Indiana	57	T17	Rhode Island	57	T17
Iowa	57	T17	South Carolina	83	1
Kansas	81	2	South Dakota	43	T41
Kentucky	67	11	Tennessee	43	T41
Louisiana	57	T17	Texas	57	T17
Maine	51	T29	Utah	73	T5
Maryland	56	T25	Vermont	31	50
Massachusetts	49	T34	Virginia	57	T17
Michigan	71	T7	Washington	41	T45
Minnesota	76	T3	West Virginia	49	T34
Mississippi	51	T29	Wisconsin	60	T15
Missouri	49	T34	Wyoming	43	T41

ENDNOTES

[1] <https://mainepolicy.org/project/emergency-powers/>

[2] <https://docs.google.com/spreadsheets/d/1F0RpnmcHh1B-niWEMsUaXaPW9iPm2N64xCBfsSSFJ4k/edit#gid=1644261140>

[3] <https://legiscan.com/AZ/bill/SB1009/2022>

[4] <https://legiscan.com/VA/text/HB158/id/2591335>

[5] https://docs.google.com/document/d/1HYejgGGMiYgZh2aST100HjDp0cjCvb90kI2ab_YbOk0/edit

[6] <https://mainepolicy.org/project/maine-policy-legislative-blueprint/>



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