

POLICY BRIEF

KEY FINDINGS

> **Maine** received an overall score of **51 out of 100 points**, landing in a tie for 27th place. This is because the governor has the sole power to initiate an emergency, while the legislature may only terminate it with a majority vote. This is not the worst policy scenario, but under single-party rule, little incentive exists for legislators to hold the governor accountable.

> **Pennsylvania, Kentucky, and North Carolina** gained the most points from 2021 to 2022, while **Arkansas, Ohio, and Montana** also made significant improvements.

> **Kansas** was the least-improved state, losing nine points year-over-year, but remained in second-place overall.

> **South Carolina, Kansas, New Hampshire, Minnesota** and **Utah** outperform the rest of the country while **Vermont, Arizona, North Dakota, Nebraska** and **Hawaii** rank among the worst.

> **Vermont** remains the lowest-ranked state because it allows certain emergency orders issued by the governor to remain in effect up to 180 days after the emergency has been terminated.

SCORING EMERGENCY EXECUTIVE POWER IN ALL 50 STATES (2022 EDITION)

“Emergencies’ have always been the pretext on which the safeguards of individual liberty have been eroded – and once they are suspended it is not difficult for anyone who has assumed such emergency powers to see to it that the emergency will persist.”

—Friedrich Hayek, *Law, Legislation and Liberty*

INTRODUCTION

In the last year, nearly every state legislator across the United States was confronted with questions on the appropriate use of emergency executive power. How long should a state of emergency last? What is the appropriate balance of power between the executive and legislative branches to determine when and where a state of emergency exists? An inextricable part of that dialogue concerned how each particular governor wielded the powers available to them under state law during the COVID-19 pandemic.

As stated in the first edition⁽¹⁾ of this scorecard, how a governor exercised their emergency powers during the COVID-19 pandemic did not inform their state’s score in this report. Rather, this report examines 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.

WHY CREATE THIS SCORECARD?

Most often, states of emergency are declared to enable state governments to respond to natural disasters. During 2020, the varied responses of many U.S. governors to the spread of SARS-CoV-2, the virus that causes COVID-19, sparked an interest among many observers of American politics to how each state delegates authority to the executive branch in emergency situations.

While most-to-all governors are bestowed equally broad emergency powers through state statute, sufficient variation exists in regard to the process of declaring, extending, or terminating states of emergency, as well as legislative checks on a governor’s authority therein.

Policymakers and other individuals interested in how their state’s law compares to others should find this analysis useful as a starting point for future legislative and legal research into the relationship between the executive and legislative branches in their state.

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RESEARCH METHODS & SCORING

Maine Policy examined each state's emergency powers statutes by utilizing either the state government website or Justia,⁽²⁾ an online legal database. This research was conducted to determine the extent of legislative oversight, the powers delegated to the chief executive, and the process for initiating or terminating a state of emergency declaration in each state. In 2019, researchers from the U.S. Centers for Disease Control and Prevention Public Health Law Program surveyed⁽³⁾ the emergency authority of U.S. governors to alter statutes and/or regulations. These findings were largely affirmed and included in Maine Policy's analysis.

Every state's emergency powers law was reviewed across five factors, and scored up to 20 possible points each, for a maximum possible score of 100. Taken into account are: 1) the process by which an emergency is declared; 2) the process by which it is extended or terminated; 3) the time limit on each emergency declaration or extension; 4) whether executive powers last after the termination of the state of emergency; and 5) whether the governor can amend or suspend statute or regulations during a declared emergency. Factors related to the declaration process and the time limitations of emergency declarations were given double weight due to their importance in setting a standard process for legislative involvement in executive emergency actions.

The highest score denotes the most stringent executive powers, allowing for the greatest accountability from the people's branch, the legislature. High scoring states maintain the clearest process for legislative involvement in terms of being required to convene and vote on the governor's declaration or extension of a state of emergency. The lowest score denotes the weakest check on executive powers and the greatest potential threat to individual liberty.

This analysis does not measure the extent of governors' authority to regulate the sale, possession, or transfer of firearms during states of emergency.

NOTABLE CHANGES TO EMERGENCY STATE GOVERNANCE IN 2021

Bills to reform state emergency processes were introduced in 46 states in 2021, 36 of which made it out of committee, and 16 which ultimately passed into law.⁽⁴⁾ Out of those states, 11 made substantive changes as measured by this analysis: Arkansas, Florida, Idaho, Kansas, Kentucky, Montana, New Hampshire, North Carolina, Ohio, Pennsylvania, and Utah. Some bills were carried over into this year's legislative session. However, if they become law, they will be considered reforms made in 2022 and included in future editions of this scorecard.

Pennsylvania, Kentucky, and North Carolina made the most progress toward a balanced emergency powers law last year. Arkansas, Ohio, and Montana also made substantial gains in their scores. Eight of the top 15 scoring states reformed their laws in 2021.

Pennsylvania voters, via a citizens' referendum passed in May of 2021, reduced the length of each emergency declaration from 90 days to just 21 days, and specified that the legislature must approve each extension of an emergency. Like many states with similar provisions, the governor may not declare another emergency under the same circumstances as the declaration which was previously rescinded.

Many states raised the bar for legislative oversight of executive actions during their 2021 legislative sessions, either to maintain an emergency for extended periods of time or to check specific orders issued by the governor. In North Carolina, a reform passed in the state budget clarified the legislative consent requirement for extended emergencies. North Carolina law now requires, after 30 days, a majority consensus of the Council of State—the Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance—or a majority vote of the full legislature after 60 days to approve of an extension of a state of emergency.

Kentucky and Ohio, two states which previously did not provide any limitation on the duration of a governor's state of emergency declaration, reformed

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their laws to limit the duration of emergency proclamations to 30 days and 90 days, respectively. Those states also initiated a process by which the legislature must approve extensions of a governor's declaration of a state of emergency. In Ohio, after 90 days, the General Assembly must approve any extensions, but for 60 days at a time.

The Ohio General Assembly may now also "rescind, in whole or in part, health department actions to prevent spread of a contagious disease via concurrent resolution." New Hampshire added a similar provision to its law, allowing the legislature to terminate "any emergency order" issued by the governor, in addition to the entire state of emergency, "by a majority vote of both the Senate and the House of Representatives."

Among those states that made changes in 2021, Kansas was the least-improved, losing nine points from the first edition. It was the only state to lose points after amending its law to allow for multiple 30-day extensions, instead of just a single extension by a small group of state government leadership. Kansas' 2021 reform bill changed the provision allowing for extension of an emergency "once for a specified period not to exceed 30 days," to allowing for multiple extensions for "specified periods not to exceed 30 days each." Despite this, Kansas maintained its second-place spot overall.

A few states which amended their laws in 2021 added provisions to expressly restrict the closure of schools or businesses, such as Kansas and Florida. These were presumably included in response to the lockdowns and distinction of "essential" and "non-essential" work and activities in the early days of the COVID-19 pandemic response. While these reforms are not included in this scorecard, they may help protect citizens' liberty in future emergencies.

MODELS FOR REFORM

Last year, the Pacific Legal Foundation (PLF), a nonprofit public interest law firm and research organization, developed model legislation⁽⁵⁾ and outlined several important aspects of an appropriately-balanced state of emergency process. "Principled reforms that reinforce separation of

powers should include requirements that emergency orders:

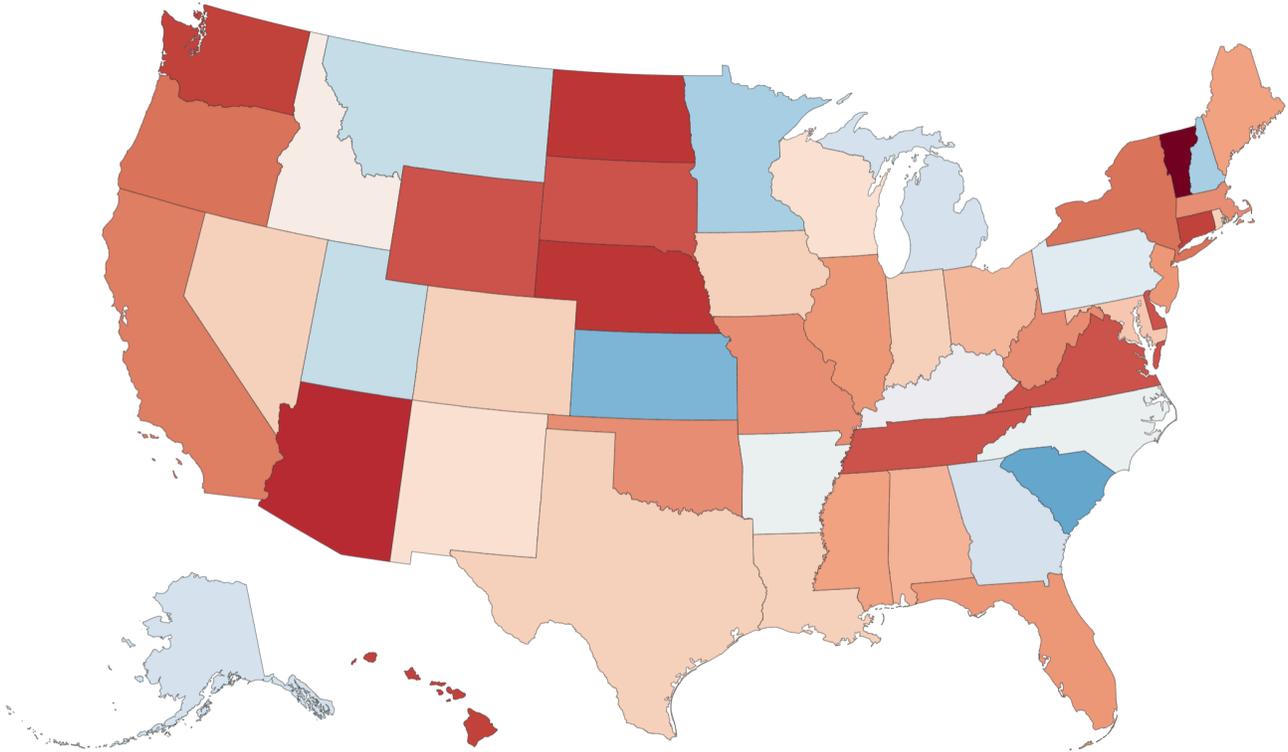
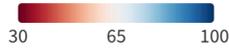
- Expire in a limited amount of time, unless ratified by the legislature;
- Be narrowly tailored for compelling health and safety reasons, and be limited in duration, applicability, and scope;
- Be subject to expedited judicial review, particularly when constitutional rights are at stake;
- Signed by the governor for statewide orders that infringe constitutional rights;
- Sunset quickly if the legislature is not in session or called into session, followed by a limited period for the legislature to ratify the order;
- Cannot be reissued by governors if the orders that have expired or the legislature rejected."⁽⁶⁾

Inspired by the work of PLF in this arena, Maine Policy developed model legislation specific to Maine law,⁽⁷⁾ incorporating those principles and ideas presented in various pieces of legislation submitted in the First Session of the 130th Legislature by numerous Maine legislators. This measure will be introduced in the First Session of the 131st Maine Legislature.

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Emergency Powers Checks & Balances Scorecard 2022

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



Maine Policy Institute Analysis of 50 US State Emergency Statutes



RANK	STATE	SCORE	RANK	STATE	SCORE	RANK	STATE	SCORE
1	SC	83	T17	IN	57	T32	WV	49
2	KS	80	T17	IA	57	36	CA	47
T3	NH	76	T17	LA	57	T37	NY	46
T3	MN	76	T17	NV	57	T37	OR	46
5	UT	73	T17	RI	57	T39	DE	43
T6	MT	71	T17	TX	57	T39	TN	43
T6	GA	71	24	MD	55	T39	VA	43
T6	AK	71	25	OH	54	T39	WY	43
T6	MI	71	26	AL	53	T39	SD	43
10	PA	69	T27	ME	51	T44	WA	41
11	KY	67	T27	MS	51	T44	CT	41
12	NC	66	T29	FL	50	T44	HA	41
13	AR	64	T29	IL	50	T47	NE	40
14	ID	63	T29	NJ	50	T47	ND	40
T15	NM	60	T32	MA	49	49	AZ	39
T15	WI	60	T32	MO	49	50	VT	31
T17	CO	57	T32	OK	49	Source: Maine Policy Institute		

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AUTHOR'S NOTES

To provide the reader with confidence in the quality of the research, this report includes a public spreadsheet to view each state's scores by category, as well as the statutes cited for analysis.⁽⁸⁾

In the 2021 scorecard, Georgia was short-changed two points under the declaration criteria even though it maintains a requirement for quick legislative action after the governor first declares an emergency, similar to Minnesota. This was the only score that changed from 2021 to 2022 without a change in law.

ENDNOTES

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

2. <https://law.justia.com/codes/>

3. <https://www.nga.org/wp-content/uploads/2019/06/An-Assessment-of-State-Laws-Providing-Gubernatorial-Authority-to-Remove-Legal-Barriers-to-Emergency-Response.pdf>

4. <https://public.flourish.studio/visualisation/5334500/>

5. <https://pacificlegal.org/wp-content/uploads/2021/02/PLF-Model-Legislation-Emergency-Power-Limitation-Act-10-09-20.pdf>

6. <https://pacificlegal.org/emergency-powers/>

7. <https://mainepolicy.org/wp-content/uploads/An-Act-To-Balance-Emergency-Powers--Maine-Policy-Model-Legislation.pdf>

8. <https://docs.google.com/spreadsheets/d/1F0Rp-nmchH1B-niWEMsUaXaPW9iPm2N64xCBfsSSFJ4k/edit#gid=1341678488>