

GOVERNANCE

The need for emergency power reform in the states

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MOUNTAIN STATES
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Introduction

Though time is said to heal all wounds, the scars from the COVID-19 pandemic lockdowns remain fresh as the nation experienced executive overreach at the federal and state levels. It is important going forward for a proper check and balance to exist. The legislative branch must remain firmly in control of policy, even during times of an emergency.

There's no question that in a real emergency, governors need broad powers to act fast. Legislative bodies take time to assemble, so they can temporarily transfer their powers to the executive in an emergency. But when problems do last for extended periods, it is the responsibility of legislators to debate risks, benefits, and trade-offs of various long-term approaches.

Lawmakers may end up passing the very policies a governor would prefer, but they do it after deliberation as representatives of the people and do it in a public process. It's the legislature – not the executive branch – that should make the laws we live under. The executive – no matter the state or the person – is supposed to implement only laws passed by the legislature.

KEY INFORMATION COLUMN

In the event of an emergency, there may be a need to enhance coordination, deploy the national guard, reallocate state and federal funds, and even modify or suspend state statutes, regulations, and legal concerns.

Purpose of Emergency Power

Gubernatorial emergency powers allow a rapid government response to emergency, disasters, or threats. In the event of an emergency, there may be a need to enhance coordination, deploy the national guard, reallocate state and federal funds, and even modify or suspend state statutes, regulations, and legal concerns. When actual disaster and emergency strikes, the government's ability to deploy resources quickly, efficiently, and unhindered is imperative to the successful management of the disaster.

As an example of defining emergency powers, Idaho Statute 46-601 Authority of Governor (1) (b) defines "state of extreme emergency as:¹

(i) The duly proclaimed existence of conditions threatening the safety of persons or property within the state, or any part thereof, caused by an enemy attack or threatened attack; or

(ii) The duly proclaimed existence of conditions threatening persons or property within the state, or any part thereof, caused by such conditions as fire, flood, storm, epidemic, pandemic, volcano, earthquake, violent insurrection, riot, revolt, explosion, cyberattack on critical infrastructure, or other conditions that by reason of their magnitude are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any county, any city, or any city and county or result in mass casualties.

Every state grants the executive branch, in the form of the governor, the authority to declare an emergency, be it natural disaster or public health emergencies. State statutes vary addressing the type of declaration, limits on the order, and legislative involvement.⁶ It is in these nuances that states vary significantly in the discretion granted to the governor and, in many cases, circumnavigate the lawmaking responsibility of the legislature.

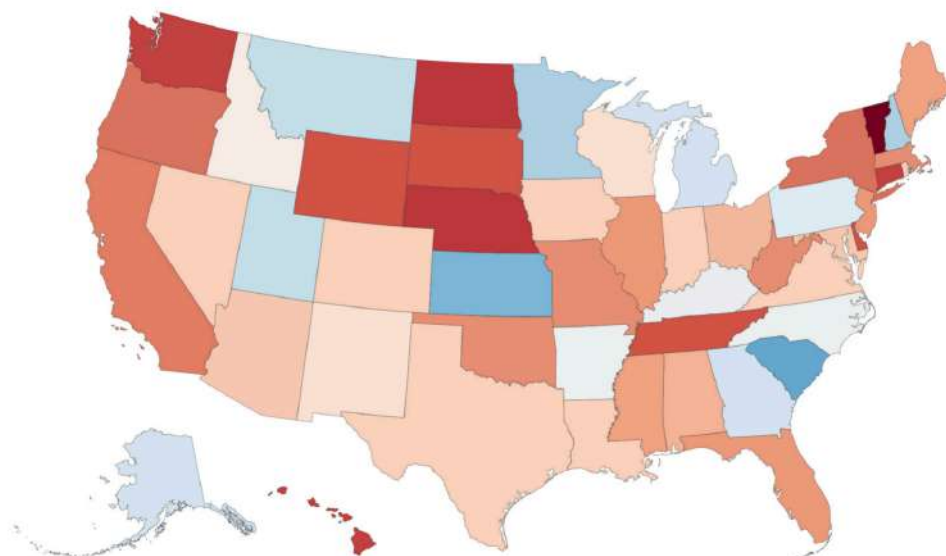
¹ "Title 46 Militia and Military Affairs, Chapter 6 Martial Law and Active Duty 46-601," Idaho Statutes, The official website of the Idaho Legislature, available at [https://legislature.idaho.gov/statutesrules/idstat/title46/t46ch6/sect46-601/#:~:text=\(2\)\(a\)%20During%20a%20emergency%20exists%2C%20subject%20to%20the](https://legislature.idaho.gov/statutesrules/idstat/title46/t46ch6/sect46-601/#:~:text=(2)(a)%20During%20a%20emergency%20exists%2C%20subject%20to%20the)

⁶ Powers and Authority, National Governors Association, National Governors Association, available at <https://www.nga.org/governors/powers-and-authority/#:~:text=Gubernatorial%20emergency%20powers%2C%20generally%20activated.across%20state%20and%20local%20agencies>

KEY INFORMATION COLUMN

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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After widespread utilization of emergency powers during the Covid-19 pandemic, and abuse in some states, 46 state legislatures proposed reforms in 2021.

An evaluation by the Maine Policy Institute compared various state statutes regarding emergency powers and scored each state based on five components. Each had a possible 20 points available, with a total of 100 points:

- Who declares a state of emergency
- Who terminates a state of emergency
- Time limits on declarations
- Powers continued after termination
- Authority to alter statutes or regulations

Between 2021 and 2022, Montana and Utah improved their scores by 10 and two points, respectively. No change in ranking or scores occurred in the region between 2022 and 2023. After widespread utilization of emergency powers during the Covid-19 pandemic, and abuse in some states, 46 state legislatures proposed reforms in 2021. Sixteen of the states passed changes, with 11 passing a substantial change, including Idaho, Montana, and Utah.⁸

For our region, Montana and Utah tie for fifth place, followed by Idaho (14th), Nevada (17th), Oregon (39th), Wyoming (41st), and Washington (45th).⁹

⁷ The 2023 Scorecard is the most recent from the Maine Policy Institute. No significant changes occurred between 2022 and 2023 in the Mountain States.

⁸ "Scoring Emergency Executive Power in All 50 States (2022)," by Nick Murray, Maine Policy Institute, available at <https://mainepolicy.org/emergency-powers-2022/>

⁹ "Emergency Powers Scorecard," Maine Policy Institute, available at <https://docs.google.com/spreadsheets/d/1F0RpnmcHh1B-niWEMsUaXaPW9iPm2N64xCBfSSfJ4k/edit?gid=1644261140#gid=1644261140>

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The termination of an emergency varies widely. Montana is the highest scoring state because both the governor and the legislature can terminate an emergency through a regular or special session.

- **Who declares an emergency?**
 - In our region, Utah is the best scoring state for who declares an emergency, followed by Montana and Nevada. Utah and Montana, allow the governor to declare the emergency but the legislature must concur within 30 days. In Montana, federal emergency declarations by the President usurp this requirement. Nevada allows both the governor or the legislature to declare an emergency. Idaho, Oregon, Washington, and Wyoming all score a four out of 20, because they only allow the governor to declare an emergency.

- **Who terminates an emergency?**
 - The termination of an emergency varies widely. Montana is the highest scoring state with 16 out of 20 because both the governor and the legislature can terminate an emergency through a regular or special session. Utah, Idaho, Nevada, and Oregon all allow the governor or a joint legislative resolution to terminate an emergency declaration. Utah scores a 14, while all others score a 12. Variance is due to the ease at which a state legislature can recall itself.
 - In Utah only the speaker and the president need to issue a joint proclamation to convene the legislature.¹⁰ Idaho allows the legislature to recall itself, thanks to a 2021 constitutional amendment approved by the voters. The amendment allows the legislature to call itself back into session with 15 days' notice and 60% approval of both chamber's members.¹¹ Nevada allows the legislature to convene if a petition is signed by two-thirds of the members of each House.¹² The Oregon legislature can convene at its own discretion thanks to a 1976 constitutional amendment. The Oregon process requires a certified ballot be sent by certified mail with a 14-day deadline, with session starting within five days of the presiding officers issuing the proclamation once the vote has been determined.¹³

¹⁰ Joint Rules, Title JR!. Joint Rules Governing General Legislative Organization Process, State of Utah, available at https://le.utah.gov/xcode/JR_1800010118000101.pdf

¹¹ "Idaho voters approve amendment allowing Legislature to call itself back for special sessions," By Kelecie Moseley-Morris, Idaho Capital Sun, November 2022, available at <https://idahocapitalsun.com/2022/11/09/idaho-voters-approve-amendment-allowing-legislature-to-call-itself-back-for-special-sessions>

¹² "Special Sessions of the Nevada Legislature," Research Division Legislative Counsel Bureau, State of Nevada, June 2023, available at <https://www.leg.state.nv.us/Division/Research/Documents/NevadaSpecialSessions.pdf>

¹³ "Special and Emergency Sessions Issue Brief," State of Oregon, Legislative Policy and Research Office, available at <https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Special-Session-2020.pdf>

KEY INFORMATION COLUMN

The most restrictive time limits for emergency declarations are Idaho and Utah at 30 days, and Montana at 45 days.

In Washington, Wyoming, and Oregon emergency powers have become overused and fail to respect the legislature's authority in lawmaking.

□ Time limits on declarations

- The most restrictive time limits for emergency declarations are Idaho and Utah at 30 days, and Montana at 45 days. All three states score 16 out of 20. Nevada, Oregon, Washington, and Wyoming have no time limits and score a 4/20.

□ Powers continued after termination

- Only six states allow powers to continue after termination. None in our region give this extra discretion to the executive branch.

□ Authority to alter statutes or regulations

- Wyoming and Nevada are the highest scoring states, because their governors are not given explicit authority to change statute or regulations. Though in Wyoming the governor can waive the enforcement of certain regulations. Idaho and Oregon allow the governor to amend regulations, but not to modify or remove statute. Utah still allows the governor to suspend any law or regulation related to the emergency (eight out of 20). Even Washington and Nevada score slightly higher than Utah because they specify that the changes cannot interfere with constitutional rights.

This review indicates that Utah, Montana, and Idaho have made significant progress with emergency power reform, though there is still room for improvement. However, in Washington, Wyoming, and Oregon emergency powers have become overused and fail to respect the legislature's authority in lawmaking.

Dangers of Emergency Power

The pandemic-era was marked by a historic rise in the use of emergency powers. Despite surviving other challenging timeframes in our nation's history, 2020 was the first time all governors declared a statewide emergency. This unprecedented use of statewide executive control lasted for years and showed the statutory holes that allowed the legislature to be overlooked if the state's governor decided there was an emergency.

It is prudent for the executive of any state to have a rapid response to actual emergencies. This awesome power, however, should be subject to meaningful legislative oversight. A comparison of our region shows that the states of Washington, Oregon, and Wyoming are very liberal in the use of emergency declarations. Limited use of emergency powers protects the impact of the

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The Evergreen state is one of only four states that bestows unilateral authority to the governor in the declaration and maintenance of emergencies.

clause and the ability for governors to make a difference in an emergency, instead of issuing statements which are routine acknowledgements without the meaningful tools and initiative to change the outcome of a disaster.

After multiple years of enduring an executive with little checks on emergency power, Washington state seems interested in adopting reforms. The Evergreen state is one of only four states that bestows unilateral authority to the governor in the declaration and maintenance of emergencies. Governor Bob Ferguson indicated his interest in some reforms by suggesting “reasonable limits on the Governor’s emergency powers.”¹⁴

At the time of this publication, it remains to be seen what these new limits will include. In the 2025 Washington legislative session, bills were introduced to allow the legislative branch to end or modify a state of emergency or extend an emergency once the new 60-day expiration passes. The proposed legislation would have prevented the governor from declaring the same emergency again without collaboration of the legislature.¹⁵ It remains to be seen if any “reasonable limits” will soon be adopted in Washington.

Emergency Power Reform

Some states in our region have put needed restraints on the executive branch to respect the balance of power shared with the legislature and judicial branches. However, for all states there are varying degrees of improvement needed.

Here are some of the best practices that should be required for the use of emergency orders:¹⁶

- 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 have expired or the legislature rejected

¹⁴ “Governor Ferguson signs three executive orders moments after inauguration,” Governor Bob Ferguson, January 2025, available at <https://governor.wa.gov/news/2025/governor-ferguson-signs-three-executive-orders-moments-after-inauguration>

¹⁵ “Volz resurrects emergency powers bill as new governor prepares to take over,” Representative Mike Volz, January 2025, available at <https://mikevolz.housepublicans.wa.gov/2025/01/15/volz-resurrects-emergency-powers-bill-as-new-governor-prepares-to-take-over>

¹⁶ “Restoring Constitutional Government in Times of Emergency,” Pacific Legal Foundation, <https://pacificlegal.org/separation-of-powers/emergency-powers>

**KEY INFORMATION
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Executive and legislative officials need to make changes regarding who declares an emergency, the branch responsible for terminating the emergency, how long it can last, and the authority granted the Governor.

Nothing in this publication shall be construed as an attempt to aid or hinder the passage of any legislation.

Conclusion

Lawmakers across the country should assess their state’s emergency power clauses and adopt the changes needed to maintain separation of powers. An excellent exercise for lawmakers is to consider the future level of comfort that would be felt if an individual of complete political polarity from them held the executive branch. Would the separation of powers still be respected and maintained?

Executive and legislative officials need to make changes regarding who declares an emergency, the branch responsible for terminating the emergency, how long it can last, and the authority granted the Governor.

Future emergencies will happen. It is imperative the ability to respond to disasters can go unhindered by red tape and roll out with expedited cooperation. However, no future emergency should be used as an excuse to allow the continuance of statutes with the potential of long-term damage to the separation of powers.

Policymaking should never be done by one person behind closed doors, even during an emergency. The number of days an emergency declaration remains in effect is less important than the requirement that the policies imposed be subject to legislative review and consent. Lawmakers must ensure that emergency powers statutes have this proper balance of power before the next emergency is declared.

ABOUT THE AUTHOR

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Madi holds a master's degree in Agricultural and Resource Economics from Colorado State University as well as a B.S. in Environmental Economics, Policy, and Management from Oregon State University.

She is the former Director for the Initiative on Agriculture at Washington Policy Center, one of the first free market think tanks in the nation to launch a focus on Agriculture.

Before joining WPC, she worked for Ag Association Management in Tri-Cities, Washington, working with growers and industry across Washington, Oregon, and Idaho. She also spent two years as an associate of The Context Network. Her time involved working as a business analyst on various agriculture projects in production, wholesale, retail, and policy Ag sectors. She was also a wildland firefighter for four summers.

Madi's work has been published in the Idaho Statesman, The Capital Press, Tri-City Herald, and the Spokesman-Review. She is the author of several children's books that are part of MSPC's *Free Markets are for Everyone* campaign.

