

Memorandum 2022-53

Emergency-Related Reforms: Informational Report

In May 2020, in response to the COVID-19 pandemic, the Commission¹ decided to devote part of its resources to studying legal issues related to the public health crisis.²

In 2021, the Commission was authorized to study the following topic:

Whether the law should be revised to provide special rules that would apply to an area affected by a state of disaster or emergency declared by the federal government, a state of emergency proclaimed by the Governor under Section 8625 of the Government Code, or a local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code. ...³

The Commission commenced work on this study in 2022.⁴ At its March 2022 meeting, the Commission directed the staff to proceed with preparation of an informational report discussing different approaches taken in emergency laws.⁵ Since then, the Commission has considered a proposed method and structure for the report and discussed alternative approaches taken in emergency laws in different jurisdictions, focusing on state-level emergency proclamations and powers.⁶ The Commission has also considered a memorandum discussing emergency spending.⁷

Memorandum 2022-52, which will also be discussed at the Commission's November meeting, presents a white paper analyzing constitutional issues related to emergency powers under California law.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (May 2020), p. 3; see also Memorandum 2020-19 and its supplements.

3. 2021 Cal. Stat. res. ch. 108 (ACR 24 (Chau)).

4. See Memoranda 2022-12, 2022-21; see also Memorandum 2022-3, pp. 29-30, 46; Minutes (Jan. 2022), p. 3.

5. See Minutes (Mar. 2022), p. 4.

6. See Memorandum 2022-27; Memorandum 2022-35 and its First Supplement.

7. See Memorandum 2022-45.

This memorandum discusses different approaches to the termination of a state of emergency. Before discussing termination approaches, this memorandum summarizes the operational elements of emergency law and the policy objectives for analyzing emergency law approaches in this study.

Towards the end, this memorandum also briefly discusses California statutes that, by their terms, provide rules for a state of emergency. And, finally, the memorandum includes brief updates regarding the Uniform Law Commission's work on public health emergency authorities and California's COVID-19 state of emergency.

OPERATIONAL ELEMENTS

Earlier in this study, Memorandum 2022-27 identified three main procedural steps in emergency law:

- (1) Establishing a state of emergency.
- (2) Exercise of emergency powers during a state of emergency.
- (3) Termination of a state of emergency.

The Commission has been presented with information describing different policy approaches taken with regard to the first two procedural steps. Memorandum 2022-27 addressed different approaches taken in laws relating to the establishment of a state of emergency. The first supplement to Memorandum 2022-35 focused on nonfiscal powers during a state of emergency. Memorandum 2022-45 discussed emergency spending issues.

This memorandum discusses different approaches related to the final procedural step — termination of an emergency.⁸

POLICY OBJECTIVES

Memorandum 2022-27 also presented policy objectives for emergency laws.⁹ These objectives are being used in this study to analyze the different approaches taken in emergency laws. For ease of reference, the policy objectives (and a brief explanation of each) are reproduced below:

- *Certainty.* The law should provide certainty about who holds emergency powers, how those powers can be exercised, under what

8. See Memorandum 2022-27, p. 3.

9. *Id.* at 2-3.

circumstances emergency actions can be taken, and how long the emergency action will last. Uncertainty could lead to problematic disputes and delay.

- *Feasibility.* Procedures for the exercise of emergency powers and oversight of emergency action need to be achievable under emergency conditions. The law should not require formalities that may not be achievable or should provide flexibility for situations when emergency conditions prevent compliance with formalities.
- *Information Input and Output.* The law should be designed to ensure government action is informed by reliable information and considers different viewpoints.
- *Oversight.* Ideally, emergency law should include a mechanism to either prevent or correct problematic inaction or abuse of emergency powers. Examples of such a mechanism include rules that delimit the scope and rules for emergency powers prior to their use or processes to identify, adjust, or override problematic misuse of emergency powers (or failures to use emergency powers when needed).
- *Speed and Nimbleness.* The law should provide for quick emergency action. In many kinds of emergencies, time is of the essence. Similarly, the law should allow quick response as conditions change or new information is received.

POLICY APPROACHES TO TERMINATION OF STATE OF EMERGENCY, GENERALLY

Different states have different approaches to address termination of a state of emergency.

Some emergency laws establish a default timeframe for a state of emergency beyond which the state of emergency would expire. Within that category, certain states may allow the Governor to extend the state of emergency, while others may require legislative action to extend the state of emergency beyond the default termination date. These emergency laws may also include conditions or requirements for extending a state of emergency.

Nearly all states' emergency laws expressly permit a state of emergency to be terminated by action, but differ in who is authorized to terminate the emergency (typically, either the Governor only or both Governor and Legislature).

This memo first addresses different approaches to termination of a state of emergency by operation of law and then addresses different approaches to termination of a state of emergency by action.

TERMINATION BY OPERATION OF LAW

In some cases, states' emergency laws¹⁰ provide for termination of a state of emergency by operation of law. These provisions provide a default timeframe beyond which the emergency would expire, absent action to extend the state of emergency.

California law does not include a default duration for a (non-war-related) state of emergency in its law.¹¹

For termination by operation of law, the primary questions to consider are the length of the default duration, who may act to extend the state of emergency beyond the default duration, and whether the law specifies any conditions or requirements for the extension of a state of emergency.

Default Duration

States have a variety of default timeframes for the expiration of a state of emergency. In some cases, states may have different timeframes for different types of emergencies. For instance, state laws may provide different default timeframes for an "emergency" versus a "local emergency."¹² Or, the rules for default timeframes may apply to a certain class of emergencies (e.g., different rules for state of war emergencies or natural disaster emergencies).¹³

10. To identify relevant provisions in different states' emergency laws, the staff utilized the compilations of emergency law information prepared by the National Conference of State Legislatures, Ballotpedia, and the Maine Policy Institute. See <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> (site date Sept. 26, 2022); https://ballotpedia.org/Sources_of_state_emergency_power_authority,_2020 (article last updated Oct. 13, 2020), [https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2022](https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2022) (last update Oct. 26, 2022); <https://docs.google.com/spreadsheets/d/1F0RpnmcHh1B-niWEMsUaXaPW9iPm2N64xCBfsSSFJ4k/edit#gid=1341678488>.

See also generally Memorandum 2022-27, pp. 3-5.

11. Gov't Code § 8629 ("The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end.").

For a state of war emergency, California law provides that the emergency terminates when "[t]he Governor has not within 30 days after the beginning of such state of war emergency issued a call for a special session of the Legislature for the purpose of legislating on subjects relating to such state of war emergency, except when the Legislature is already convened with power to legislate on such subjects." *Id.* § 8624(b).

12. Compare, e.g., Gov't Code § 8630 (7-day ratification period for a local emergency, as well as a 60-day review of the need for the local emergency) with the provisions cited in *supra* note 11.

13. See, e.g., *supra* note 11; see also W. Va. Code Ann. § 15-5-6 (providing for proclamations of a "state of emergency" or "state of preparedness" and setting forth a 30-day time limit for a state of preparedness).

For the purposes of this discussion, the staff sought to identify the general timeframes that would apply to an emergency generally or a public health emergency after the initial proclamation. In some instances, the default timeframe also applies to extensions of the state of emergency or the law may include a separate timeframe for extensions (e.g., state of emergency lasts, by default, for 60 days from the proclamation, but can be extended in 30-day increments). Default timeframes for extensions are discussed separately later in this memorandum.¹⁴

Emergency laws can also specify multiple timeframes applicable in different situations. For instance, in Minnesota, the law provides for two different expiration dates, with different conditions required to extend the emergency beyond those dates.¹⁵

The default timeframes for a state of emergency in different emergency laws include the following:

- 5 days.¹⁶
- 14 days.¹⁷
- 15 days.¹⁸
- 21 days.¹⁹
- 28 days.²⁰
- 30 days.²¹

14. See discussion of “Duration Limits for State of Emergency Extensions” *infra*.

15. See Minn. Stat. Ann. § 12.31(2)(a), (b).

16. *Id.* § 12.31(2)(a) (“A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council up to 30 days.”).

17. Or. Rev. Stat. Ann. § 433.441(5).

18. D.C. Code Ann. §§ 7-2304.01(c)(6) (applicable to public health emergency orders), 7-2306 (applicable to all emergency orders); Kan. Stat. Ann. § 48-924(b)(3) (“[N]o state of disaster emergency may continue for longer than 15 days unless ratified by concurrent resolution of the legislature....”); S.C. Code Ann. § 25-1-440(a)(2) (“A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly[.]”).

19. N.H. Rev. Stat. Ann. § 4:45(II)(a) (“A state of emergency shall terminate automatically 21 days after its declaration unless it is renewed”); Pa. Const. art. IV, § 20(c) (“A disaster emergency declaration under subsection (a) shall be in effect for no more than twenty-one (21) days, unless otherwise extended in whole or part by concurrent resolution of the General Assembly.”).

20. Mich. Comp. Laws Ann. § 30.403(3) (“The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days.”).

21. Alaska Stat. Ann. § 26.23.020(c) (“A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution.”); Colo. Rev. Stat. Ann. § 24-33.5-704(4) (“...[N]o state of disaster emergency may continue for longer than thirty days unless renewed by the governor.”); Del. Code Ann. tit. 20, § 3115(c) (“No state of emergency can continue for more than 30 days without being renewed by the Governor.”); Ga. Code Ann. § 38-3-51(a) (“No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor.”); Idaho Rev. Stat. § 46-1008(2) (“...[N]o state of disaster emergency may continue for longer than thirty (30) days unless the governor finds that it should

- 45 days.²²
- 60 days.²³
- 6 months.²⁴

In some states, the emergency law includes a contingent default duration for emergencies, which only takes effect if the condition in the law is met. Such a duration could be conditioned, for example, on the Governor’s failure to call a special session of the Legislature after a request by legislative representatives.²⁵

be continued for another thirty (30) days or any part thereof.”); Ind. Code Ann. § 10-14-3-12(a) (“A state of disaster emergency may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor.”); Iowa Code Ann. § 29C.6(1) (“A state of disaster emergency shall continue for thirty days, unless sooner terminated or extended in writing by the governor.”); La. Stat. Ann. § 29:724(B)(1) (“[N]o state of disaster or emergency may continue for longer than thirty days unless renewed by the governor.”); Me. Rev. Stat. Ann. tit. 37-B, § 743(2) (“No state of emergency may continue for longer than 30 days unless renewed by the Governor.”); Md. Code Ann., Pub. Safety § 14-107(a)(3) (“A state of emergency may not continue for longer than 30 days unless the Governor renews the state of emergency.”); Miss. Code Ann. § 33-15-11(b)(17), (18); N.J. Stat. Ann. § 26:13-3(b) (“Any public health emergency ... shall be terminated automatically after 30 days unless renewed by the Governor”); N.M. Stat. Ann. § 12-10A-5(D)(2) (“A declaration of a state of public health emergency shall be terminated... automatically after thirty days, unless renewed by the governor after consultation with the secretary of health”); R.I. Gen. Laws Ann. § 30-15-9(b) (“...[N]o state of disaster emergency may continue for longer than thirty (30) days unless renewed by the governor.”); Tex. Gov’t Code Ann. § 418.014(c) (“A state of disaster may not continue for more than 30 days unless renewed by the governor.”); Utah Code Ann. § 53-2a-206(2)(a)(ii); V.I. Code Ann. tit. 23, § 1005(d); see also *supra* note 16; 20 Ill. Comp. Stat. Ann. 3305/7 (“Upon [a disaster] proclamation, the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers....”).

22. Mont. Code Ann. § 10-3-303(3)(a) (“Except as provided in subsection (3)(b) [providing rule for droughts, earthquakes, flooding, and wildfires], a state of emergency or disaster may not continue for longer than 45 days unless continuing conditions of the state of emergency or disaster exist, which must be determined through a poll of the legislature as provided in 10-3-122 or by the declaration of the legislature by joint resolution of continuing conditions of the state of emergency or disaster.”); Tenn. Code Ann. § 58-2-107(b)(2) (“...[N]o state of emergency may continue for longer than forty-five (45) days unless renewed by the governor.”).

23. Ala. Code § 31-9-8(a) (“The emergency ... shall terminate 60 days after the date on which it was proclaimed unless the Governor extends the emergency by proclamation or the Legislature extends the emergency by a joint resolution.”); Ark. Code Ann. § 12-75-107(g)(3)(A) (“...[T]he statewide state of disaster emergency related to public health shall not continue for longer than sixty (60) days ... unless renewed by the Governor, so long as the Legislative Council does not vote to deny the request for renewal.”); Fla. Stat. Ann. § 252.36(2) (“...[N]o state of emergency may continue for longer than 60 days unless renewed by the Governor.”); Haw. Rev. Stat. Ann. § 127A-14(d) (“A state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency”); Wis. Stat. § 323.10 (“A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature.”); see also draft PHEA Act, *infra* note 32, § 4(d).

24. N.Y. Exec. Law § 28(3) (“Such order or orders shall remain in effect for a period not to exceed six months”); P.R. Laws Ann. tit. 3, § 1942 (“The Executive Orders issued by the Governor ... to declare emergencies[] shall be effective for no longer than six (6) months.”).

25. See, e.g., N.D. Cent. Code Ann. § 37-17.1-05(3)(b) (“If the governor does not call a special session within seven days after the legislative management sends a request to the governor, the declared state of disaster or emergency relating to public health terminates thirty days after the request from the legislative management was sent to the governor.”); see also National Conference of State Legislatures webpage on Special Sessions, <https://www.ncsl.org/research/about-state->

Laws that provide a default duration for a state of emergency would seem to further the following policy objectives:

- *Certainty.* This approach provides for a definite expiration date for the state of emergency (and a process by which it can be extended).
- *Information Input and Output.* To the extent that extension of a state of emergency includes notice or other requirements, this approach could lead to additional public notice/awareness or prompt comment.
- *Oversight.* By proactively establishing a timeframe for states of emergency, this approach is a means by which the Legislature can limit and monitor the duration of a state of emergency.

However, establishing a default duration for a state of emergency could be in tension with the following policy objectives:

- *Feasibility.* This approach may be problematic, particularly in situations where the default timeframe is short and emergency conditions make it difficult or impossible to undertake the actions needed to extend the state of emergency (e.g., legislative approval).
- *Speed and Nimbleness.* This approach could inhibit emergency response if the emergency expires before the emergency needs are met (this might occur, for instance, where the default timeframe is short and extension requires formal, collective action). This could be particularly problematic if a new state of emergency could not be proclaimed due to expiration of the initial state of emergency.²⁶

Who May Extend the Emergency Beyond Default Duration?

Typically, emergency laws either permit the Governor, the Legislature, or both to extend a state of emergency beyond the default duration.²⁷

In a few states, legislative approval is required for the state of emergency to continue beyond a certain timeframe.²⁸

legislatures/special-sessions472.aspx (identifying N.D. as a state where only the Governor may call a special session).

26. See discussion of “Preclusive Effect of Termination” *infra*.

27. See, e.g., Ala. Code § 31-9-8(a) (extension by either Governor or Legislature), Colo. Rev. Stat. Ann. § 24-33.5-704(4) (extension by Governor), Mich. Comp. Laws Ann. § 30.403(3) (extension by Legislature).

In Minnesota, the law provides for an initial extension by a separate entity, the Executive Council. Minn. Stat. Ann. § 12.31(2)(b) (In Minnesota, the Governor can proclaim an emergency for five days and the emergency can be extended by the Executive Council, comprised of the Governor, Lieutenant Governor, Secretary of State, State Auditor, and Attorney General, for up to 30 days.). See also Kan. Stat. Ann. § 48-924(b)(3), reproduced in *infra* note 29 (allowing extension by legislative coordinating council).

28. See [https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020-2022](https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020-2022) (identifying four states — Alaska, Kansas, Michigan, and Minnesota — that require a legislative vote “on extending or terminating a

In general, the question of who is permitted to extend the state of emergency involves a trade-off between different policy considerations. Allowing extension by the Governor (a single individual acting alone) would typically be quicker (*Speed and Nimbleness*) and less likely to be impaired by emergency conditions (*Feasibility*). Allowing extensions by the Legislature (a multi-member body acting collectively) would typically provide more varied input into the decision (*Information Input and Output*) and distribute the decision-making power regarding the state of emergency (*Oversight*).

Options for Legislative Involvement in Extension Decisionmaking

In some cases, emergency laws may be crafted to permit extensions in a manner that may be quicker or more feasible than standard legislative action, while still ensuring legislative involvement in decisions regarding extension of a state of emergency (although, perhaps, not with as much opportunity for input or transparency as the standard legislative process).

One way this can be done is providing special rules or an alternative process for legislative action on extensions where the Legislature is not in session or may be precluded (e.g., by emergency conditions) from taking action.²⁹

Another way this can be done is by granting the Governor authority to extend the state of emergency, but also requiring the Legislature to be called into session for the purpose of considering the extension of the emergency.³⁰

These approaches may be a way to balance the policy objectives, permitting extensions to occur quickly and feasibly during emergencies, while also providing more oversight and input through some form of legislative involvement.

governor's emergency declarations"); see also South Carolina law cited in *supra* note 18, Pennsylvania law cited in *supra* note 19, Montana law cited in *supra* note 22, and Wisconsin law cited in *supra* note 23.

29. See, e.g., Kan. Stat. Ann. § 48-924(b)(3) (“[N]o state of disaster emergency may continue for longer than 15 days unless ratified by concurrent resolution of the legislature, with the single exception that upon specific application by the governor to the legislative coordinating council and an affirmative vote of five of the members thereof, a state of disaster emergency may be extended for specified periods not to exceed 30 days each.”); Mont. Code Ann. § 10-3-122(1)(a) (When the legislature is not in session, the governor may, in writing, request the secretary of state to poll the members of the legislature to determine if a majority of the members of the house of representatives and a majority of the members of the senate are in favor of a legislative declaration affirming to extend a state of emergency or disaster under 10-3-303...).

30. See, e.g., V.I. Code Ann. tit. 23, § 1005(d) (The Governor may renew the initial state of emergency for one additional 30-day period. But to extend the state of emergency beyond the two 30-day periods, before the expiration of the second 30-day period, the Governor shall submit legislation to the Legislature requesting an extension of the state of emergency.); see also N.H. Rev. Stat. Ann. § 4:45(II)(d).

Required Conditions for Extension

Some emergency laws may place substantive or procedural requirements on the extension (or renewal) of a state of emergency. The policy objectives achieved by such an approach depend on the details of what the law requires. The discussion below provides some concrete examples of the approaches taken in different emergency laws and how they fare with respect to the policy objectives.

Extension Subject to Same Requirements as Initial State of Emergency Proclamation

Where the Governor is empowered to extend the state of emergency, emergency laws can require that extensions of a state of emergency follow the same set of rules regarding content and procedure that govern the initial proclamation.³¹ Along these lines, the draft of the Uniform Law Commission's Model Public-Health-Emergency Authority Act ("draft PHEA Act") permits the Governor to extend the emergency, but requires that all of the information required for an initial proclamation (as well as the required follow-up report) be prepared for an extension.³²

Even in situations where an emergency law does not expressly subject initial proclamation and extensions to a single set of rules, the law may separately require that the initial proclamation and the extension meet a certain requirement.³³ For instance, in New Mexico, the law separately requires that the Governor consult with the Secretary of Health before proclaiming or extending a state of public health emergency.³⁴

In general, the main policy objective furthered by this general approach is:

31. See, e.g., Ark. Code Ann. § 12-75-107(d)(1) ("All executive orders or proclamations issued under this section shall indicate the nature of the disaster, the area or areas threatened, and the conditions which have brought it about or which make possible termination of the state of disaster emergency."); N.J. Stat. Ann. § 26:13-3(b) ("Any public health emergency declared pursuant to this act shall be terminated automatically after 30 days unless renewed by the Governor under the same standards and procedures set forth in [for declarations]."); see also N.H. Rev. Stat. Ann. § 4:45(II)(a).

32. See July 8-14, 2022 Annual Meeting Discussion Draft of the Model Public-Health-Emergency Authority Act, § 4(a), (b), (e) (June 28, 2022), available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e69f22d9-7bec-6a9d-981f-c0781a1dfbb8&forceDialog=0> (hereafter, "draft PHEA Act"); see also, e.g., Conn. Gen. Stat. Ann. § 19a-131a(b)(2) ("The [public health emergency] renewal declaration shall state the nature of the continuing public health emergency, the political subdivisions or geographic area subject to the renewal, the conditions that have brought about the renewal declaration, the duration of the renewal declaration and the public health authority responding to the public health emergency.").

33. See, e.g., Conn. Gen. Stat. Ann. § 19a-131a(b)(1), (2) (same filing requirement for declarations and extensions, but stated separately).

34. See N.M. Stat. Ann. § 12-10A-5(A), (D)(2).

- *Certainty.* This approach provides predictability and consistency with respect to what is required to both proclaim and extend and emergency.

Depending on the details of what is required for the initial proclamation, this approach could further the following policy objectives:

- *Information Input and Output.* Typically, the emergency law will require that the emergency proclamation include information about the emergency (and/or a consultation requirement, as in New Mexico law, described above). Where extension of the state of emergency must also satisfy information disclosure or consultation requirements, this objective would be furthered.
- *Oversight.* Similarly, where the act of extending a state of emergency must be done publicly and in a certain form, this approach will facilitate oversight and review. The act of extension could prompt attention by those who are concerned about the state of emergency's continuance.

To the extent that the requirements are burdensome or the emergency impairs the ability to meet the requirements, this approach could be in tension with the *Feasibility* and *Speed and Nimbleness* policy objectives. However, the possibility of problems with satisfying the requirements seems remote (especially since the requirements would have been met for the initial proclamation).

Rules for Legislative Consideration of State of Emergency Extension Requests

Where legislative approval of a state of emergency extension is required, the emergency laws can set forth rules for the making and consideration of extension requests. For instance, the emergency law could include rules that prioritize legislative consideration of state of emergency extension requests.³⁵

For legislative approval, it is important to note that different states' legislatures have very different schedules and different general rules for the Legislature to call itself into session.³⁶ The need for special procedural rules for legislative approval of emergency extensions may be more or less acute depending on these factors (e.g., if the default timeframe for a state of emergency is longer than any legislative recess period).

35. See, e.g., V.I. Code Ann. tit. 23, § 1005(d) ("The Legislature shall consider a request for an extension of the state of emergency not later than five days after its receipt. If the Legislature fails to consider the request within the five-day period, the state of emergency is automatically extended for an additional 30 days.").

36. See generally <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/01/10/stateline-2022-calendar>.

In some cases, emergency laws provide rules for the process for obtaining legislative approval for an emergency extension when the Legislature is not in session. Different states' laws take different approaches to addressing this issue. One option is to simply require that the Legislature be called into session. For instance, Minnesota law requires the Governor to convene the legislature if there is a need to extend the emergency beyond 30 days.³⁷ Another option is to provide a special process or rule for obtaining approval from the legislative branch when the Legislature is out of session. For instance, Kansas allows the "legislative coordinating council" to consider and approve extension requests.³⁸ And, Montana law establishes a special legislative polling procedure to be used to determine whether an emergency can be extended.³⁹ These approaches could be useful in a situation where the emergency interferes with the Legislature's ability to convene in person and conduct business using the standard legislative process (although it should be noted that these procedures may provide less opportunity for input and involvement of the public).

This approach seems to further the following policy objectives:

- *Certainty.* This approach provides more clarity around how extension requests will be addressed in different circumstances.
- *Feasibility.* Where this approach addresses situations where the Legislature is unable to consider extension requests in session (either due to legislative calendar or emergency considerations), this approach could provide a practicable alternative for state of emergency extensions.
- *Speed and Nimbleness.* Where this approach prioritizes legislative consideration of extension requests, this approach facilitates quick action. Also, where this approach provides an alternative process for legislative consideration of extension requests, that process may be quicker than calling the Legislature into session.

37. See Minn. Stat. Ann. § 12.31(2)(b). In Minnesota, the Governor can proclaim an emergency for five days and the emergency can be extended by the Executive Council for up to 30 days. See *supra* text associated with note 15.

38. Kan. Stat. Ann. § 48-924(b)(3). See generally *id.* §§ 46-1201(a) ("There is hereby established the legislative coordinating council which shall have eight members. Such members shall be the president of the senate, the speaker of the house of representatives, the vice president of the senate, the speaker pro tem of the house of representatives, the majority leader of the senate, the majority leader of the house of representatives, the minority leader of the senate, and the minority leader of the house of representatives."), 46-1202 ("The legislative coordinating council shall represent the legislature when the legislature is not in session.").

39. See Mont. Code Ann. § 10-3-122. Using that procedure, the Governor requests that the Secretary of State poll legislative members to determine whether a majority of both houses would support extending the emergency.

It is difficult to assess how this approach fares with respect to the following policy objectives:

- *Information Input and Output.* Where the approach provides an alternative process for legislative approval, the alternative would allow for legislative input (where it might not otherwise be possible), but may not have as much opportunity for input from the public (the staff is uncertain whether and how the public could participate in or monitor these alternative processes).
- *Oversight.* Similarly, where the alternative process provides an opportunity for legislative oversight where the traditional legislative process is not possible or infeasible, this approach would further this policy objective. However, it is difficult to compare the degree of oversight provided by the alternative processes.

Information Preparation/Disclosure Requirements for State of Emergency Extensions

In addition to providing process rules, the emergency law could also require that the Governor prepare certain information when the Governor seeks to extend a state of emergency (regardless of whether legislative approval is required).

As indicated above, some emergency laws simply require the same information be prepared for the extension of a state of emergency, as an initial proclamation.⁴⁰

In other cases, the law may provide specific requirements for an extension. For example, in Arkansas, the law requires that the Governor, when seeking to extend a public health emergency, prepare a written statement to the “Legislative Council” specifying the number of days the emergency will continue (not to exceed 60 days) and the rationale for continuing the emergency.⁴¹ And, in the Virgin Islands, the emergency law requires that a renewal request to the Legislature include “the specific reasons for the extension, the time-period of the extension, and a plan of action to address the conditions that necessitate the extension of the state of emergency.”⁴²

40. See *supra* text associated with notes 31 and 32.

41. Ark. Code Ann. § 12-75-107(g)(3)(B). This information must be prepared 10 days prior to the expiration date of the emergency. The emergency will renew unless the Legislative Council votes to deny the request. *Id.* § 12-75-107(g)(3)(C), (E).

The Legislative Council is an “ad interim committee of the General Assembly.” See *id.* § 10-3-301(a). It consists of “36 regular members - 20 House members and 16 Senators. In addition, there are 24 ex-officio voting members and 5 ex-officio non-voting members.” <https://www.arkleg.state.ar.us/Committees/Detail?code=000&ddBienniumSession=2021%2F2022F>.

42. V.I. Code Ann. tit. 23, § 1005(d).

This approach of requiring that certain information be prepared (and made available) for an extension of a state of emergency would seem to further the following policy objectives:

- *Certainty.* This approach identifies what information must be prepared/provided when the Governor seeks to extend a state of emergency.
- *Information Input and Output.* The approach would seem to provide more access to information about the state of emergency and, depending on the details of the requirement, the Governor's expectations and plans for addressing the state of emergency.
- *Oversight.* This approach could facilitate legislative oversight of the Governor's emergency response, particularly where the information is provided in conjunction with legislative consideration of an extension request.

This approach may be in tension with the following policy objectives:

- *Feasibility.* Depending on the details of this requirement and the nature of the emergency itself, this approach may require the Governor to include information that may be impractical to accurately assess. For instance, where emergency conditions are changing rapidly and the timelines for extension are short, it simply may not be possible to assess how long the state of emergency will last or develop a thorough and robust response plan.
- *Speed and Nimbleness.* This approach requires some resources and attention be committed to preparing the necessary information. Also, to the extent that the information included in the extension request limits the Governor's emergency authority (either the duration or the substantive authority) and the emergency conditions change, this approach could impede nimble response.

Different Rules for Emergency Powers After Extension of Emergency

Emergency laws can also provide for different rules for a state of emergency in the period after extension. In such cases, the Legislature is typically granted additional authority to respond to the Governor's emergency acts or limit the Governor's powers in the period after the state of emergency has been extended. Some examples of this approach are described below.

After a statewide public health emergency has been extended, Arkansas law permits the "Legislative Council" to terminate individual emergency orders.⁴³

43. Ark. Code Ann. § 12-75-114(f)(3); see also *supra* note 41.

Utah law allows the Legislature to limit the Governor's emergency powers when extending a state of emergency. Specifically, Utah law provides, in part:

... If the Legislature finds that emergency conditions warrant the extension of a state of emergency beyond 30 days ..., the Legislature may extend the state of emergency and specify which emergency powers described in this part are necessary to respond to the emergency conditions present at the time of the extension of the state of emergency.

(ii) Circumstances that may warrant the extension of a state of emergency with limited emergency powers include:

(A) the imminent threat of the emergency has passed, but continued fiscal response remains necessary; or

(B) emergency conditions warrant certain executive actions, but certain emergency powers such as suspension of enforcement of statute [sic] are not necessary.

(b) For any state of emergency extended by the Legislature beyond 30 days ..., the Legislature may, by joint resolution:

(i) extend the state of emergency and maintain all of the emergency powers described in this part; or

(ii) limit or restrict certain emergency powers of:

...

(B) the governor as described in Section 53-2a-204;

...

(D) other executive emergency powers described in this chapter.⁴⁴

North Dakota law expressly allows the Legislature to modify a state of emergency (in addition to the powers to extend or terminate).⁴⁵ It is unclear what this modification power could entail (e.g., geographic limitations on the area subject to the state of emergency, duration limits for the state of emergency, substantive limits on the Governor's emergency powers under the statute).

In some cases, emergency laws may provide rules for emergencies based on the length of the emergency or the amount of money spent responding to the emergency, as opposed to whether an extension of the emergency has occurred. Such rules could apply before the state of emergency requires extension or after the state of emergency has been extended.⁴⁶

44. Utah Code Ann. § 53-2a-206(4).

45. See N.D. Cent. Code Ann. § 37-17.1-05(3)(b) ("If the legislative assembly [is called into special session and] meets to address a declared state of disaster or emergency, the legislative assembly by concurrent resolution may terminate, extend, or modify the state of disaster or emergency.").

46. See generally, e.g., Alaska Stat. Ann. § 26.23.020(h)-(k) (spending rules based on amount of emergency spending); Fla. Stat. Ann. § 252.3611(2), (3) (rules regarding emergency spending transparency applicable after duration of 60 days and 1 year); see also Fla. Stat. Ann. § 252.36(2) (emergency lasts for 60 days unless renewed by Governor).

This approach of providing additional rules or legislative options for longer-term emergencies would seem to further the following policy objectives:

- *Certainty.* Under this approach, the law sets forth rules that apply at later stages of the state of emergency. This provides some predictability about what is required or what could happen (with respect to the Governor’s emergency powers) at different stages of the state of emergency.
- *Information Input and Output.* In some cases, this approach could provide additional opportunities for legislative input into the process. Depending on the details of this approach, the approach could increase the availability of information (e.g., additional information requirements for emergency spending beyond a certain threshold).
- *Oversight.* Under this approach, the Legislature typically is granted a broader role in delineating the limits of the Governor’s emergency authority (or the scope of the state of emergency itself).

This approach could be in tension with the following policy objectives:

- *Feasibility.* Where the emergency conditions change in unpredictable ways or unforeseen emergency effects arise, this approach could lead limit the Governor’s emergency authority in ways that hinder emergency response.
- *Speed and Nimbleness.* Similarly, this approach could limit the ability of the Governor to quickly and nimbly respond to worsening emergency conditions or unforeseen emergency effects.

Duration Limits for State of Emergency Extensions

Emergency laws can permit extensions as needed to address the emergency, without a specific duration limit on the extension or the entire state of emergency.⁴⁷ Commonly, however, emergency laws that provide for extension of a state of emergency also include some duration limit for the extension. One option is that the emergency law could simply specify that the state of emergency cannot last beyond a certain duration without extension (e.g., the law could provide that ‘no state of emergency may continue for longer than 30 days unless extended’).⁴⁸

Emergency laws could provide that any extension of a state of emergency is subject to a certain duration limit (which may or may not be the same as the default

47. See, e.g., N.H. Rev. Stat. Ann. § 4:45(II)(a) (“The governor may, by executive order, renew a declaration of a state of emergency as many times as the governor finds is necessary to protect the safety and welfare of the inhabitants of this state.”).

48. See generally provisions cited in *supra* note 21; see also, e.g., Center for Law and the Public’s Health, Model State Emergency Health Powers Act (Oct. 23, 2001), § 305(b), *available at* <https://biotech.law.lsu.edu/blaw/bt/MSEHPA.pdf>.

duration for the initial state of emergency declaration).⁴⁹ Or, the emergency law may require that the extension itself specify the duration.⁵⁰

In other cases, the law may provide a default duration that specifically applies to extensions of a state of emergency made in accordance with certain processes.⁵¹ Where the Governor is empowered to extend the emergency, the Governor may only have the authority to extend the emergency for a certain number of days. Where the Legislature is generally empowered to extend the emergency, the emergency law may provide special rules for extensions when the Legislature is not in session. These laws generally require approval of some subset of legislative members or through a simplified process to address extensions of the state of emergency when the Legislature is not in session.

For example, Kansas law provides for a 30-day limit on extensions of states of emergency made by the legislative coordinating council (while the Legislature is not in session).⁵² Similarly, Montana law provides a legislative polling procedure to extend the emergency with the Legislature is not in session. Any extensions of the state of emergency made using this procedure can be up to 45 days.⁵³

And, as noted above, the emergency law may specify a definite timeframe for the end of the entire state of emergency.⁵⁴ For example, Puerto Rico law provides that the Governor may “authorize the continuation of the state of emergency for the time deemed appropriate, *without exceeding the term of his/her office.*”⁵⁵ The

49. See, e.g., D.C. Code Ann. § 7-2306(b), (c); Or. Rev. Stat. Ann. § 433.441(5) (“A declaration of a state of public health emergency expires when terminated by a declaration of the Governor or no more than 14 days after the date the public health emergency is declared unless the Governor expressly extends the declaration for an additional 14-day period.”).

50. Mich. Comp. Laws Ann. § 30.403(3) (“After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a *specific number of days* is approved by resolution of both houses of the legislature.” (emphasis added)).

51. See, e.g., Minn. Stat. Ann. § 12.31(2).

52. See Kan. Stat. Ann. § 48-924(b)(4).

53. Mont. Code Ann. § 10-3-122(1)(b).

54. Where the emergency law does not expressly authorize extensions, the state of emergency could be continued by the issuance of new proclamations. See, e.g., Haw. Rev. Stat. Ann. § 127A-14(d) (“A state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency....”); see also COVID-19 Emergency Proclamations of Hawaii Governor David Ige, *available at* <https://governor.hawaii.gov/category/covid-19/covid-19-emergency-proclamations/> (In the Twenty-First Proclamation Related to the COVID-19 Emergency, note the dates of the COVID-19 proclamations in first “Whereas” clause, all of which were issued less than 60 days after the preceding proclamation).

55. P.R. Laws Ann. tit. 3, § 1942 (emphasis added).

drafting committee for the draft PHEA Act will be discussing the possibility of including a duration limit for the overall public health emergency in the Act.⁵⁶

Overall, this approach of identifying the timeframe for the state of emergency extension would seem to perform similarly with respect to the policy objectives as the approach of providing a default duration for states of emergency generally (discussed previously).

TERMINATION BY ACTION

Nearly all of the emergency laws reviewed by staff expressly provide for the termination of a state of emergency by action.⁵⁷

After a brief discussion of laws that provide a specialized process for legislative review (and possible termination) of a state of emergency when it is proclaimed and law that requires periodic review of states of emergency, this section of the memorandum discusses the different policy approaches relating to the termination of a state of emergency more generally.

Generally, the discussion assumes that the emergency conditions themselves will not impair the feasibility of taking action to terminate the emergency.

Mechanism for Legislative Disapproval of State of Emergency Proclamation

In some cases, emergency law provides a specific mechanism for legislative disapproval of a state of emergency proclamation.

In Arkansas, the law provides for the House and Senate to convene “as a committee of the whole” to debate and vote on a resolution to end a statewide emergency related to public health within eight days of the proclamation.⁵⁸ If within five days of the Governor being presented with such a resolution, the Governor vetoes (or does not otherwise approve) the resolution, the law provides a mechanism for the Legislature to override the Governor’s veto.⁵⁹

56. See *infra* note 101 and associated text.

57. One exception is Alabama’s emergency law, which includes only a single provision that references termination. That provision provides that “[t]he emergency, whether proclaimed by the Governor or by the Legislature, shall terminate 60 days after the date on which it was proclaimed unless the Governor extends the emergency by proclamation or the Legislature extends the emergency by a joint resolution.” Ala. Code § 31-9-8(a). It is not clear whether the Governor or Legislature may have more general authority that would allow for termination a state of emergency.

58. Ark. Code Ann. § 12-75-107(g)(2)(A).

59. *Id.* § 12-75-107(g)(2)(D).

In Connecticut, the Governor's public health emergency proclamation can be disapproved within 72 hours of the proclamation's filing by a vote of a specified legislative committee.⁶⁰

In general, a law providing a specific mechanism for legislative disapproval of state of emergency proclamations (and a specified timeline for action) would further the following policy objectives:

- *Information Input and Output.* By providing for legislative action on the proclamation, this approach would likely promote early communication between the Governor and the Legislature related to the state of emergency.
- *Oversight.* This approach provides a specified timeline for the Legislature to make a decision on the need for the state of emergency.

This approach has mixed results for the following policy objective:

- *Certainty.* This approach would further this objective by giving the Legislature a specific, defined role at the specified time. However, this approach may impede the Governor's ability to act in that timeframe, given the uncertainty around the possibility of legislative disapproval.
- *Speed and Nimbleness.* This approach could prompt quick legislative action and oversight, but could delay emergency response until after the Legislature has acted.

This approach could be in tension with the following policy objective:

- *Feasibility.* Emergency conditions could render collective action of the Legislature impractical on a short timeframe, particularly if the Legislature is not already in session.

Required Periodic Review of a State of Emergency

New Hampshire's emergency law provides for ongoing periodic legislative review of a state of emergency. Specifically, New Hampshire's law specifies:

Ninety days from the date of declaration of a state of emergency, and every 90 days thereafter, the governor shall call, pursuant to Part II, Article 50 of the New Hampshire constitution, and address a joint session of the general court, and shall provide a written copy of the

60. Conn. Gen. Stat. Ann. §§ 28-9(a), 19a-131a(b)(1) (the legislative committee consists of the president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both houses of the General Assembly, and, for a public health emergency, the cochairpersons and ranking members of the joint standing committee of the General Assembly having cognizance of matters relating to public health; for a civil preparedness emergency, at least one of the minority leaders must vote for disapproval).

address to all members of both chambers within 5 business days. At such joint session, the legislature shall vote on whether to terminate the state of emergency by concurrent resolution adopted by a simple majority of both chambers acting separately on the following question: “Shall the current state of emergency be terminated?” For purposes of this section, “simple majority” means a majority of members present and voting “yea” in both chambers.⁶¹

New Hampshire law permits the Governor acting alone to extend a state of emergency.⁶² New Hampshire also permits the Legislature to proclaim, extend, or terminate a state of emergency.⁶³

In general, this law provides a mechanism to ensure that the Legislature is periodically apprised of the state of emergency and obligated to decide whether to terminate the emergency. It is important to note that the overall result may be similar in jurisdictions where a state of emergency (and subsequent extensions) are limited in duration and the Legislature is obligated to approve extensions (i.e., the Legislature periodically considers and votes on the state of emergency).

This approach of requiring periodic updates to and votes by the Legislature seems to further the following policy objectives:

- *Certainty.* This approach provides for legislative review at specified intervals.
- *Information Input and Output.* This approach ensures that the Governor and Legislature communicate about the state of emergency. Since this approach requires the communication to be at a legislative session, this approach could also facilitate public access to the information and public input to the legislative decisionmaking.
- *Oversight.* This approach ensures that the Legislature maintains an active oversight role for the state of emergency. This approach could prevent abdication of the oversight responsibility through inaction or inattention.

This approach may be in tension with the following policy objective:

- *Feasibility.* This approach does not address what should happen if the required acts cannot occur (due to emergency conditions).

61. N.H. Rev. Stat. Ann. § 4:45(II)(d).

62. See *id.* § 4:45(II)(a) (“The governor may, by executive order, renew a declaration of a state of emergency as many times as the governor finds is necessary to protect the safety and welfare of the inhabitants of this state.”).

63. See *id.* § 4:45(I), (II)(a), (II)(c).

Who May Terminate a State of Emergency by Action?

In general, emergency laws expressly authorize either only the Governor or both the Governor and the Legislature to terminate a state of emergency. A different approach is taken in North Carolina (i.e., law permits either the Governor or the Legislature to proclaim a state of emergency and provides for termination only by the proclaiming entity). All of these approaches are described in more detail below, along with a discussion of how the approaches fare with respect to the policy objectives.

In some cases, where an emergency law authorizes the Legislature to vote on termination, the emergency law indicates that the Governor must formally terminate the state of emergency after the Legislature votes in favor of termination.⁶⁴ For the purposes of this memorandum, the staff does not distinguish between laws that appear to authorize the Legislature to terminate the state of emergency directly versus those that require the Governor to act after a legislative vote in favor of termination. Nor does the staff assess the policy implications of these different mechanisms. However, the staff notes that this distinction could be relevant to broader legal issues regarding the Legislature's authority to terminate a state of emergency.⁶⁵

For the discussion below, the staff generally considered the *Speed and Nimbleness* policy objective to be furthered by approaches that would bring the state of emergency to an end quickly and provide flexibility for termination.

Either the Governor or the Legislature

In emergency laws, the most common approach is to permit either the Governor or the Legislature to terminate a state of emergency.⁶⁶ This is the approach taken in California's law.⁶⁷ Often, these emergency laws (either

64. See, e.g., text associated with *infra* note 78.

65. See generally draft PHEA Act, *supra* note 32, Prefatory Note and § 5, Comment 3.

66. See generally discussion of "Legislative power to terminate governor's declaration by state" on [https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2022](https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2022) (map identifies 17 states that do not permit the Legislature to vote to terminate a Governor's emergency declaration; site notes that the map is current as of April 7, 2021).

67. Gov't Code § 8629 ("The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end.").

expressly or impliedly) allow either the Governor or the Legislature to terminate the state of emergency at any time.⁶⁸

In a few cases, the Legislature's authority to terminate the state of emergency may be limited in some manner. For instance, the Legislature may only be authorized to terminate the state of emergency after a specified timeframe.⁶⁹ Or, the Legislature may only be empowered to decide on whether to extend a state of emergency (which gives the Legislature the decision on whether the state of emergency should terminate by operation of law or be extended).⁷⁰

Overall, the approach of permitting either the Governor or the Legislature to terminate a state of emergency could further the following policy objective:

- *Information Input and Output.* By empowering either the Governor or the Legislature to terminate a state of emergency, this approach may encourage communication about the status of the state of emergency and continued emergency response needs.

Since either the Governor or the Legislature could terminate the emergency, this approach could, in practice, realize the following policy objectives:

- *Feasibility.* In general, the Governor can act more quickly and easily to terminate a state of emergency than the Legislature.
- *Oversight.* The Legislature is empowered to assess whether the state of emergency and the Governor's emergency powers should be ended.

This approach may have mixed results for the following policy objectives:

- *Certainty.* This approach makes clear that either the Governor or the Legislature can terminate the emergency. However, since both are empowered to act, it may be less clear if and when either party should act. This could lead to a delay in the termination of the state of emergency. However, such a delay is most likely to occur in situations where neither party sees a strong need to terminate the state of emergency (and, thus, may be more of a theoretical concern).
- *Speed and Nimbleness.* This approach is more nimble in that it permits termination by multiple actors. However, as indicated above, the

68. See, e.g., *id.*; Colo. Rev. Stat. Ann. § 24-33.5-704(4); N.H. Rev. Stat. Ann. § 4:45(II)(b), (c); see also generally Maine Policy Institute, *Emergency Powers Scorecard 2021-2022*, available at <https://docs.google.com/spreadsheets/d/1F0RpnmcHh1B-niWEMsUaXaPW9iPm2N64xCBfsSSFJ4k/edit#gid=1341678488> (hereafter, "MPI Analysis").

69. See, e.g., Ohio Rev. Code Ann. § 107.42(D)(1) ("After a state of emergency declared by the governor has been in effect for thirty calendar days, the general assembly may terminate the state of emergency by adopting a concurrent resolution.").

70. See, e.g., Mich. Comp. Laws Ann. § 30.403(4); Utah Code Ann. § 53-2a-206(2)(a), (b).

approach of allowing either party to end the state of emergency could lead to a delay in the termination.

Only the Governor

In several states, the emergency law only authorizes the Governor to terminate a state of emergency.⁷¹

It is important to note that, even where the emergency law expressly authorizes only the Governor to terminate a state of emergency, there may be other options to end the state of emergency. For instance, the Legislature could enact a statute to terminate the state of emergency. Or, relief could be sought in the courts (e.g., such claims could include, for instance, that the situation does not meet the definition of a “state of emergency” or specified conditions for termination have been met).

This approach would seem to further the following policy objectives:

- *Certainty.* This approach makes clear that it is the Governor’s role to assess the emergency conditions and the ongoing need for the state of emergency.
- *Feasibility.* Since the Governor can terminate the state of emergency by acting alone, this approach does not require any formalities that would seem to impair termination.

This approach would have mixed results for the following policy objective:

- *Speed and Nimbleness.* While the Governor could act quickly to terminate the state of emergency, this approach is less nimble as it only permits one person, the Governor, to end the state of emergency.

This approach would be in tension with the following policy objectives:

- *Information Input and Output.* By granting the sole termination power to the Governor, this approach may not provide for much communication or input regarding the state of emergency.
- *Oversight.* This approach does not provide an express mechanism to address situations where the Governor should, but does not, terminate the state of emergency. As indicated above, there may be oversight mechanisms in other general law or the political process.

71. See, e.g., Haw. Rev. Stat. Ann. § 127A-14(c), (d); N.M. Stat. Ann. § 12-10A-5(D); see also generally MPI Analysis, *supra* note 68 (identifying 12 states where Governor, but not Legislature, is authorized to terminate a state of emergency).

Whoever Proclaimed the State of Emergency

North Carolina law permits either the Governor or the Legislature to proclaim a state of emergency.⁷² Currently, the law specifies that the state of emergency “shall expire when it is rescinded by the authority that issued it.”⁷³ This provision has been amended (effective January 1, 2023) to provide a different rule for statewide emergencies (requiring legislative concurrence after certain timeframes).⁷⁴ The rule requiring rescission by the issuing authority will continue to apply to states of emergency that are not statewide in scope.⁷⁵

The approach of authorizing only the issuing authority to terminate a state of emergency would seem to further the following policy objective:

- *Certainty.* This approach identifies a single actor who can terminate a state of emergency.

This approach would seem to be in tension with the following policy objectives:

- *Information Input and Output.* This approach, by granting sole authority to terminate a state of emergency to the issuing authority, would not seem to promote information sharing or communication regarding the state of emergency.
- *Oversight.* This approach does not provide a clear mechanism for responding when the issuing authority is not taking appropriate action to end a state of emergency. As indicated above, with respect to Governor-only termination rules, there may be more general legal mechanisms that could be used in this situation (e.g., seeking relief in the courts).

Depending on who is authorized to terminate the state of emergency, this approach could have mixed results for the following policy objectives:

- *Feasibility.* For a legislatively-proclaimed state of emergency, the Legislature may be temporarily unable to terminate the state of emergency if it is out of session or is otherwise unable to take action (e.g., lacks a quorum). For a gubernatorially-proclaimed state of emergency, this approach seems feasible.
- *Speed and Nimbleness.* In general, this approach is not nimble as it only permits a single actor to terminate. For a legislatively-proclaimed state of emergency, termination of the state of emergency may be delayed due to session timing, as indicated

72. N.C. Gen. Stat. Ann. § 166A-19.20(a).

73. *Id.*

74. N.C. Gen. Stat. Ann. § 166A-19.20(c) (eff. Jan 1, 2023), as amended by 2021 N.C. Sess. Laws 180 (SB 105), § 19E.6(b).

75. *Id.*

above. For a gubernatorially-proclaimed state of emergency, the Governor could presumably act quickly to terminate the state of emergency.

Statutory Direction Regarding When to Terminate State of Emergency

Commonly, emergency laws simply authorize the Governor and/or the Legislature to terminate a state of emergency without providing specific direction about when termination should occur.

Some emergency laws, however, provide direction as to when a state of emergency should or must be terminated. Where this direction exists, it typically applies to termination by the Governor (some laws also apply or provide separate guidance for legislative termination, as in Guam’s law, reproduced below).

In some cases, the direction regarding termination may be very general. For example, California law specifies that the Governor must terminate the state of emergency “at the earliest possible date that conditions warrant.”⁷⁶ Similarly, Washington’s law provides that the Governor must terminate a state of emergency “when order has been restored in the area affected.”⁷⁷ Montana law also takes a similar approach, obligating the Governor to terminate a state of emergency in the following circumstances:

- (a) the emergency or disaster has passed;
- (b) the emergency or disaster has been dealt with to the extent that emergency or disaster conditions no longer exist; or
- (c) at any time the legislature terminates the state of emergency or disaster by joint resolution. However, after termination of the state of emergency or disaster, disaster and emergency services required as a result of the emergency or disaster may continue.⁷⁸

The Draft PHEA Act allows for termination when the situation no longer constitutes a public-health emergency under the act. Specifically, the relevant provision provides:

The [Governor] may terminate a declaration of a public-health emergency by [executive order] in a record if the [Governor] determines that the situation is no longer a public-health emergency and the determination is rationally based on evidence then available to the [Governor] about the nature of the agent, toxin, or natural disaster giving rise to the public-health emergency and the risk posed by the agent, toxin, or natural disaster.⁷⁹

76. Gov’t Code § 8629.

77. Wash. Rev. Code Ann. § 43.06.210.

78. Mont. Code Ann. § 10-3-303(4).

79. Draft PHEA Act, *supra* note 32, § 5(a).

In some cases, the emergency law may provide more detail as to how to assess whether the state of emergency should end. Guam’s emergency law describes a finding for both executive and legislative termination of a public health emergency. Specifically, Guam’s law provides:

[The Governor] shall terminate the declaration of a state of public health emergency by executive order upon finding that the occurrence of an illness or health condition that caused the emergency no longer poses a high probability of a large number of deaths in the affected population, a large number of incidents of serious permanent or long-term disability in the affected population, or a significant risk of substantial future harm to a large number of people in the affected population. ...

By a majority vote, [The Guam Legislature] may terminate the declaration of a state of public health emergency at any time from the date of original declaration upon finding that the occurrence of an illness or health condition that caused the emergency does not or no longer poses a high probability of a large number of deaths in the affected population, a large number of incidents of serious permanent or long-term disability in the affected population or a significant risk of substantial future harm to a large number of people in the affected population.⁸⁰

Although these different policies may differ significantly in their particulars, the approach of specifying when a state of emergency should be terminated would seem to further the following policy objectives:

- *Certainty.* The approach provides direction as to how to assess whether a state of emergency should be extended or terminated. How well individual policies achieve this objective will depend on the details of the specified standard.
- *Information Input and Output.* By establishing a standard for assessing when termination should occur, this approach could encourage communication that focuses on progress toward that standard and whether that standard is satisfied.
- *Oversight.* By establishing a standard for the termination of the state of emergency, this approach could facilitate oversight and review with respect to that standard.

This approach may have mixed results for the following policy objectives:

- *Feasibility.* In an emergency where conditions change significantly over time in different directions, it may be difficult to assess when the standard is satisfied and whether the standard will continue to be satisfied over time (e.g., in a pandemic, the emergency may

80. 10 Guam Code Ann. § 19405(a), (c) (brackets as in source).

alternate between phases where transmission is high and medical resources are strained and phases where transmission is low and medical resources are stable).

- *Speed and Nimbleness.* This approach may result in relatively early termination (versus situations where no standard exists), but may not be sufficiently nimble to address the type of emergency described above. Specifically, this approach could lead to inappropriately early termination when the emergency circumstances are temporarily under control, but are not yet fully managed. Premature termination could be particularly problematic where termination has a preclusive effect (see discussion of this issue later in the memorandum).

Mechanisms for Termination

In general, the staff did not see many notable differences in emergency laws on this point.

Typically, the Governor can terminate a state of emergency by executive order or proclamation.⁸¹

Often, the Legislature is authorized to terminate a state of emergency by concurrent resolution (as in California).⁸² The staff notes that the use of the concurrent resolution for legislative termination of a state of emergency has been the subject of some attention, as described in the bullets below:

- Pennsylvania’s Governor and Legislature were involved in a lawsuit related to the Legislature’s attempt to terminate the COVID-19 emergency by concurrent resolution. The Pennsylvania Supreme Court concluded that the Governor could veto the concurrent resolution (and thereby continue the state of emergency). In response, the Legislature referred a constitutional amendment to the ballot (which was later adopted) that allowed the Legislature to pass a resolution (by simple majority) to extend or terminate a state of emergency, which the Governor is not authorized to veto.⁸³

81. See, e.g., Gov’t Code § 8629; Colo. Rev. Stat. Ann. § 24-33.5-704(4); Haw. Rev. Stat. Ann. § 127A-14(d); La. Stat. Ann. § 29:724(B)(2); R.I. Gen. Laws Ann. § 30-15-9(b); Wis. Stat. Ann. § 323.10.

82. See generally N. Birdsong, *Balancing Legislative and Executive Powers in Emergencies*, National Conference of State Legislatures LegisBrief, Vol. 28, No. 25 (July 2020) (“In 24 states, including the unicameral Nebraska, an emergency declaration may be terminated by a resolution passed by all legislative chambers.”); see also *supra* note 66.

In some cases, the law may permit a subset of the Legislature to terminate by resolution. See, e.g., Iowa Code Ann. § 29C.6(1) (allowing the legislative council to rescind a proclamation, by resolution, when the General Assembly is not in session); <https://www.legis.iowa.gov/committees/committee?ga=87&groupID=703>. And, in Nebraska, the unicameral Legislature is also permitted to terminate a state of emergency by resolution. See Neb. Rev. Stat. Ann. § 81-829.40(3).

83. Pa. Const. art. III, § 9. The summary of this situation is drawn from the materials at [https://ballotpedia.org/Pennsylvania_Question_1,_Legislative_Resolution_to_Extend_or_Terminate_Emergency_Declaration_Amendment_\(May_2021\)](https://ballotpedia.org/Pennsylvania_Question_1,_Legislative_Resolution_to_Extend_or_Terminate_Emergency_Declaration_Amendment_(May_2021)).

- Draft PHEA Act comment language indicates that “the constitutional authority for a Legislature to override the Governor’s orders differs from state to state. ... Under some states’ constitutions, a concurrent resolution is binding only when it relates to the internal functions of the Legislature. In those states, a statutory provision authorizing the Legislature, by concurrent resolution, to terminate the Governor’s declaration of a public-health emergency would be an unconstitutional legislative veto.”⁸⁴

For legislative termination, the staff found that some laws either do not specify a means for termination or specify something other than a resolution. For example, in Alaska, the Legislature is simply authorized to “terminate a disaster emergency at any time by law.”⁸⁵ Guam’s law specifies that the Legislature may terminate a state of public health emergency by majority vote.⁸⁶ And, Louisiana’s emergency law allows a single house to terminate a state of emergency “by petition signed by a majority of the surviving members of either house.”⁸⁷

In general, the main policy objective related to the means of termination is certainty, as described below.

- *Certainty.* In general, this approach furthers certainty if it makes clear by the appropriate means to terminate a state of emergency.

Depending on the means of termination, this approach may also affect the following policy objectives:

- *Feasibility.* For legislative termination, this approach may need to account for the possibility of termination while the Legislature is out of session or otherwise unable to act.
- *Information Input and Output.* Where the means of termination includes formal documentation (e.g., resolution) and associated practices, this approach can help to ensure information about termination is available and disseminated.

84. Draft PHEA Act, *supra* note 32, § 5 Comment.

85. Alaska Stat. Ann. § 26.23.025(c).

86. 10 Guam Code Ann. § 19405(c); see text associated with *supra* note 80 (reproducing this provision); but see also 10 Guam Code Ann. § 19405(d) (“All orders or legislative actions terminating the declaration of a state of public health emergency shall indicate the nature of the emergency, the area(s) that was threatened and the conditions that make possible the termination of the declaration.”).

87. La. Stat. Ann. § 29:724(B)(2).

PRECLUSIVE EFFECT OF TERMINATION

In most cases, terminating a state of emergency ends the Governor’s emergency powers associated with that emergency.⁸⁸ If, after termination, there is a need for continued emergency powers, a new state of emergency would need to be proclaimed. However, a number of emergency laws specify that termination of a state of emergency has a preclusive effect.

Generally, in these cases, the law prohibits the Governor from proclaiming a state of emergency based on similar facts and circumstances as a terminated state of emergency. For example, Montana’s emergency law specifies that “[t]he governor may not declare another state of emergency or disaster based on the same or substantially similar facts and circumstances without legislative approval.”⁸⁹ And, Utah law only allows the Governor to declare a new state of emergency in exigent circumstances after expiration of a state of emergency. However, after that new state of emergency expires, Utah law prohibits the Governor from issuing another declaration (even in exigent circumstances). Specifically, Utah’s law provides:

(3)(a) After a state of emergency expires ..., the governor may declare a new state of emergency in response to the same disaster or occurrence as the expired state of emergency, if the governor finds that exigent circumstances exist.

...
(c) After a state of emergency declared in accordance with Subsection (3)(a) expires, the governor may not declare a new state of emergency in response to the same disaster or occurrence as the expired state of emergency, regardless of whether exigent circumstances exist.⁹⁰

In some cases, emergency laws provide that termination has a preclusive effect only in certain circumstances (e.g., termination by legislative action). For example, Louisiana law provides that a legislative petition for termination can “establish a

88. See generally, e.g., Del. Code Ann. tit. 30, § 3103(2) (defining “emergency period” to extend 60 days after termination of a state of emergency); Me. Rev. Stat. Ann. tit. 37-B, § 742(C) (specified powers terminate 30 days following the termination of the state of emergency); Vt. Stat. Ann. tit. 20, § 9(10), (11) (specified powers are valid for the state of emergency plus 180 days); see also First Supplement to Memorandum 2022-35, p. 35, fn. 113.

89. Mont. Code Ann. § 10-3-303(1); see also, e.g., Pa. Const. art. IV, § 20(d) (“Upon the expiration of a disaster emergency declaration under subsection (a), the Governor may not issue a new disaster emergency declaration based upon the same or substantially similar facts and circumstances without the passage of a concurrent resolution of the General Assembly expressly approving the new disaster emergency declaration.”).

90. Utah Code Ann. § 53-2a-206(3).

period during which no other declaration of emergency or disaster may be issued.”⁹¹

Alternatively, the emergency law could be drafted to make clear that termination does not preclude a new state of emergency for different circumstances. For example, New Hampshire law provides that a legislative vote for termination “shall not preclude the governor from declaring a new emergency for different circumstances....”⁹²

In general, the approach of describing the preclusive effect of a state of emergency termination would seem to further the following policy objectives:

- *Certainty.* This approach makes clear the effect of termination of a state of emergency and provides guidance as to when a subsequent state of emergency could be declared (e.g., changed circumstances, exigent circumstances, with legislative approval).
- *Oversight.* In this approach, the Legislature defines in advance the conditions for a new state of emergency declaration after termination. This approach could also specifically require legislative approval of a new state of emergency declaration.

Depending on the implementation of this approach, this approach could be in tension with the following policy objectives:

- *Feasibility.* This approach could be problematic in situations where the emergency terminates by operation of law (e.g., emergency conditions prevented a required legislative extension). Also, this approach could be problematic if the law is understood to preclude *any* new state of emergency declaration for a specified period of time (i.e., where an entirely new emergency condition, that may or may not be unrelated to the initial state of emergency, arises).
- *Speed and Nimbleness.* Where legislative approval is required for a new state of emergency declaration, this approach could result in delays of such a declaration (particularly where the Legislature is out of session).

This approach may have indirect effects on the following policy objective:

- *Information Input and Output.* By establishing a standard for whether a new state of emergency declaration is appropriate, this approach may encourage communication around whether that standard is met.

91. La. Stat. Ann. § 29:724(B)(2).

92. N.H. Rev. Stat. Ann. § 4:45(II)(c).

EMERGENCY RULES OUTSIDE THE EMERGENCY LAW

Where it is clear that certain legal requirements need to yield or be adjusted during an emergency, the Legislature may proactively decide to enact special rules that would apply when a state of emergency is in effect. This approach can give the Legislature a greater role in establishing the how the law will operate in emergency circumstances and ensure that appropriate rules are in effect, without a specific act of the Governor beyond the initial declaration.

A comparative analysis of such rules would require a significant commitment of resources, as those rules could be scattered throughout the laws of different jurisdictions and may use different conventions for specifying their application (i.e., “in a proclaimed state of emergency,” “for an area affected by a proclamation pursuant to Section ...,” etc.).

This general approach could be used to address a variety of different issues and could be crafted to provide a specific rule applicable only to a certain type of emergency. The following list provides excerpts of different provisions in California law that include special rules applicable in a state of emergency.

- Business & Professions Code § 3502.5: “[A] physician assistant may perform [certain specified] medical services ... during any state of war emergency, state of emergency, or state of local emergency, as defined in Section 8558 of the Government Code, and at the request of a responsible federal, state, or local official or agency, or pursuant to the terms of a mutual aid operation plan established and approved pursuant to the California Emergency Services Act....”
- Civil Code § 4735(c): During a state of emergency for drought, “an association shall not impose a fine or assessment against an owner of a separate interest for reducing or eliminating the watering of vegetation or lawns”⁹³
- Civil Code § 5450: Authorizing a common interest development association to conduct meetings by teleconference in a situation where “gathering in person is unsafe or impossible because the common interest development is in an area affected by” a state of emergency.⁹⁴
- Health & Safety Code § 101040(a): “The local health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during

93. Subdivision (d) of this section provides an exception related to recycled water availability and use.

94. This section was recently enacted based on a Commission recommendation. See 2021 Cal. Stat. ch. 276 (SB 391); *Emergency-Related Reforms: Common Interest Development Meetings*, 47 Cal. L. Revision Comm’n Reports 209 (2020).

any 'state of war emergency,' 'state of emergency,' or 'local emergency,' as defined by Section 8558 of the Government Code, within his or her jurisdiction."⁹⁵

- Health & Safety Code § 121071: Chapter related to health certificates for imported dogs does not apply to "a dog imported as a result of a declared emergency as described by Section 8558 of the Government Code."
- Penal Code § 396(b): "Upon the proclamation of a state of emergency declared by the President of the United States or the Governor... and for a period of 30 days following that proclamation or declaration, it is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency, or prior to a date set in the proclamation or declaration."⁹⁶
- Vehicle Code § 21057: "Every police and traffic officer is hereby expressly prohibited from using a siren or driving at an illegal speed when serving as an escort of any vehicle, except ... when expediting movements of supplies and personnel for any federal, state, or local governmental agency during a national emergency, or state of war emergency, or state of emergency, or local emergency as defined in Section 8558 of the Government Code."

In general, this approach would seem to further the following policy objectives:

- *Certainty*. This approach allows for rules to be crafted in advance of the state of emergency and can provide specific authority for needed emergency actions.
- *Oversight*. This approach allows the Legislature to specify, in advance, certain rules for emergency operations. In this role, the Legislature could craft rules that address what might otherwise be legal impediments to emergency response (and preemptively address situations that could otherwise require emergency executive action to resolve).

95. Subdivision (b) of this section defines "preventative measure" to mean "abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health."

96. This subdivision also includes a rule allowing for higher price increases that are directly attributable to increases in cost.

Subsequent subdivisions provide similar emergency pricing rules for repair and reconstruction services, hotel and motel rates, and housing rental rates.

This approach could have mixed results with respect to the following policy objective:

- *Speed and Nimbleness.* This approach is fast, in that the rules are simply applicable once the state of emergency is proclaimed without any further action. By codifying these rules, this approach is not that nimble, as the rules require action to change if they turn out to be problematic or in need of adjustment.

This approach may be in tension with the following policy objective:

- *Feasibility.* In general, this approach relies on foresight about emergency needs and limitations. The feasibility of this approach may depend on how well the projection of emergency needs on which the rule was based matches the actual needs in emergency conditions.

UPDATE REGARDING MODEL PUBLIC-HEALTH-EMERGENCY AUTHORITY ACT

The Model Public-Health-Emergency Authority Act drafting committee will be meeting on November 11th and 12th to discuss a variety of drafting issues related to the draft PHEA Act (referred to as the “Draft Model Law” below).⁹⁷ The committee is hoping to reach resolution on a number of drafting issues described in a memorandum prepared by the Committee’s Reporter.⁹⁸ The memorandum identifies a number of issues for discussion including:

- Should the definition of “public-health emergency” be changed to qualify or clarify its scope?⁹⁹
- Should the Draft Model Law be amended to clarify its relationship with other statutes that empower Governors to declare other types of emergencies?¹⁰⁰

97. See generally Materials for November 11-12, 2022 meeting of Public-Health-Emergency Authority Committee, *available at* <https://www.uniformlaws.org/viewdocument/2022-november-11-12-committee-mee?CommunityKey=be7c4af5-73e0-4307-8d5a-ca281b8216cd&tab=librarydocuments>.

98. Memorandum Regarding Issues from First Reading from Rob Gatter, Reporter to PHEA Model Law Drafting Committee (Sept. 9, 2022), *available at* <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7330c360-9c3d-7f2b-0b28-c10cca315542&forceDialog=0s> (hereafter, “Issues Memorandum”).

99. See Issues Memorandum, *supra* note 98, pp. 1-2; see also draft PHEA Act, *supra* note 32, § 2(5).

100. See Issues Memorandum, *supra* note 98, p. 2; see also draft PHEA Act, *supra* note 32, § 3 (“Except as provided in Section 10 [re preemption of local public health power], this [act] supersedes other law of this state to the extent the law conflicts with this [act].”).

- Should there be a limit for the overall duration of a declaration of public health emergency under the Draft Model Law?¹⁰¹
- Should the Draft Model Law’s provisions regarding legislative termination of a public health emergency be adjusted or clarified?¹⁰²
- Should the illustrative list of authorized emergency orders in the Draft Model Law be adjusted or expanded?¹⁰³

The drafting committee also has an upcoming meeting scheduled for February 10-11, 2023.

UPDATE REGARDING CALIFORNIA’S STATE OF EMERGENCY FOR COVID-19

In mid-October, Governor Newsom announced his intention to end California’s COVID-19 state of emergency on February 28, 2023.¹⁰⁴ The press release notes that “[t]his timeline gives the health care system needed flexibility to handle any potential surge that may occur after the holidays in January and February, in addition to providing state and local partners the time needed to prepare for this phaseout and set themselves up for success afterwards.”¹⁰⁵ To maintain the state’s capacity to process COVID-19 tests and administer COVID-19 therapeutics, Governor Newsom will be seeking two legislative changes.¹⁰⁶

Respectfully submitted,

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101. See Issues Memorandum, *supra* note 98, pp. 4-6 (specifically, the Issues Memorandum asks about a 180-day limit). The Draft Act requires renewal 60 days after the declaration and each subsequent renewal. See *id.* at 3; see also draft PHEA Act, *supra* note 32, § 4(d).

102. See Issues Memorandum, *supra* note 98, pp. 6-7, 9; see also text associated with *supra* note 84 (quoting language of draft PHEA Act, § 5 Comment).

103. See Issues Memorandum, *supra* note 98, pp. 7-8; see also draft PHEA Act, *supra* note 32, § 6(b).

104. See Office of Governor Newsom Press Release, “Governor Newsom to End the COVID-19 State of Emergency” (Oct. 17, 2022), available at <https://www.gov.ca.gov/2022/10/17/governor-newsom-to-end-the-covid-19-state-of-emergency/>.

105. *Id.*

106. *Id.* (“To maintain California’s COVID-19 laboratory testing and therapeutics treatment capacity, the Newsom Administration will be seeking two statutory changes immediately upon the Legislature’s return: 1) The continued ability of nurses to dispense COVID-19 therapeutics; and 2) The continued ability of laboratory workers to solely process COVID-19 tests.”).