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SELECT STATE EFFORTS TO REASSESS EXECUTIVE BRANCH EMERGENCY POWERS

Policy Analysis

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Select State Efforts to Reassess Executive Branch Emergency Powers

Given current political climates and the ongoing COVID-19 pandemic, some state legislatures are reevaluating the emergency powers given to their chief executives. This brief analyzes recently enacted legislation aimed at revising emergency executive powers and provides a contrary example in Georgia, which last revised emergency executive powers in 2014. While this brief primarily focuses on emergency powers in Southern states, legislation recently enacted in Indiana is also included. Additionally, this brief overviews Southern state legislatures' mechanisms for calling themselves into a special legislative session.

State Legislatures and Special Sessions

The CSG South states are split when it comes to the ability of a state legislature to convene itself into a special session. Only a governor can call a special session in Alabama, Mississippi, South Carolina, and Texas. Meanwhile, Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, North Carolina, Oklahoma, Tennessee, Virginia, and West Virginia each have provisions allowing the legislature to call itself into session.ⁱ

The mechanisms for legislatures to call themselves into session vary from state to state. For example, in Florida, the speaker of the House and president of the Senate can file a joint resolution with the secretary of state (two members) or a three-fifths majority of members if at least twenty percent of members sign on to certificates requesting a poll of the legislature. Georgia requires a petition signed by three-fifths of the legislators in each chamber to be delivered to the governor and secretary of state, regardless of the involvement of chamber leadership. Louisiana only requires a simple majority of members in each house to sign on to a petition to their presiding officer. Missouri has the highest threshold of both a joint proclamation from the Senate president pro tempore and the speaker of the House and a petition signed by three-fourths of members. North Carolina requires no notice to the governor or secretary of state but requires a joint declaration and support of three-fifths of members. Oklahoma and Tennessee require presiding officers to issue a call upon receipt of a petition signed by two-thirds of the members in each chamber. Virginia and West Virginia require the legislature to petition the governor for a special session with a two-thirds and three-fifths majority of members, respectively.ⁱⁱ Meanwhile, Arkansas and Kentucky are able to call themselves into a special session but only in narrow circumstances, as discussed elsewhere in this brief.



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Arkansas Senate [Bill 379 \(2021\)](#)

Enacted by lawmakers during the 2021 Regular Session of the 93rd General Assembly with an emergency clause to take effect immediately upon being signed into law by Governor Asa Hutchinson, SB 379 amends the statutory guidelines for executive emergency declarations.ⁱⁱⁱ Specifically, it allows legislative leadership - or a majority of members of both chambers - to convene a special session to debate terminating a governor's declared emergency. Upon written request by the speaker of the House, the Senate president pro tempore, or 51 representatives and 18 senators,^{iv}

Through an approved concurrent resolution, the General Assembly may terminate - without limitation - any state of disaster or public health emergency. The ending of the state of emergency may occur either upon expiration of the existing proclamation or at an earlier date, as noted in the approved resolution.^v Following this, the governor has five days - excluding Sundays - to veto the resolution. If the governor vetoes the resolution, the General Assembly may consider an override upon the request of chamber leadership or a majority of members.^{vi}

In response to the COVID-19 pandemic, the measure creates new statutory guidelines governing public health emergencies. The governor may only declare a state of disaster emergency related to public health if a minimum of 19 of the 75 counties in the state, or if 25 percent of the state's total population is affected by the disaster related to the declaration either at one time or cumulative.^{vii} The General Assembly must then convene within eight business days to debate the statewide declaration and vote upon a concurrent resolution to end the state of disaster emergency related to public health.^{viii} If the General Assembly does not terminate the disaster status, any extension past the initial 60 days requires the governor's renewal - subject to the authority residing with the Legislative Council to deny any such request.^{ix}

The Arkansas Legislative Council (ALC) comprises 36 legislators - 20 Representatives and 16 Senators - that periodically convene to conduct legislative business during session interims.^x For a public health emergency extension, the governor must submit a written renewal request to the ALC 10 days before the expiration of the existing order.^{xi} Only a majority vote of the quorum present is needed for the ALC to deny the extension. The ALC also is empowered to consider each emergency order or proclamation individually, even if all are related to the same public health disaster.^{xii}

Kentucky Senate [Bill 1 \(2021\)](#)

During its 2021 Regular Session, the Kentucky General Assembly approved SB 1 to limit the governor's authority during states of emergency. Specifically, the measure includes any gubernatorial actions that place restrictions on in-person gatherings or functions of schools, businesses, or nonprofits; political, religious, social events; places of worship; local governments; or any executive directive that imposes mandatory quarantine or isolation requirements. Such emergency actions are limited to 30 days, subject



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to the General Assembly's approval of any extension, amendment, or termination.^{xiii} Requests for an extension of a gubernatorial order or proclamation not meeting the above pandemic-related requirements necessitates the request of the relevant local government authority and is even then only subject to the specified locality.^{xiv}

Additionally, the legislation prohibits the governor from issuing a substantially similar directive regarding the same emergency without the express prior approval of the General Assembly.^{xv} The General Assembly may convene at any time and take up a joint resolution to terminate a state of emergency.^{xvi} The measure also includes a provision waiving the commonwealth's immunity in actions brought against it in federal court related to the aforementioned emergency conditions.^{xvii} SB 1 also repeals a section of statute that previously provided broad powers to the governor to take actions to promote and secure the safety of the populace.^{xviii}

In response to concerns of deficient inter-branch dialogues, the legislation requires the governor to submit standardized written reports to the General Assembly (or the Legislative Research Commission if in an interim) detailing expenses and revenues related to the state of emergency.^{xix}

In addition to curtailing executive powers, SB 1 contains provisions pertaining to the receipt of federal funds and the execution of state contracts during periods of crisis and rights to in-person religious worship and free assembly.^{xx} Senate Bill 1 also requires any gubernatorial suspension of existing laws to be approved, in writing, by the attorney general. It also excludes these new additions to the emergency powers statutes, among others, from suspension by the governor during a state of disaster.^{xxi}

Although SB 1 was vetoed by Governor Beshear, the General Assembly quickly overrode it on February 2, 2021. In his veto message, the governor asserted that the bill was unconstitutional and an infringement upon the separation of powers.^{xxii} Following a legal challenge by the governor, the state Supreme Court unanimously ruled that SB 1 was constitutional.^{xxiii}

Indiana [House Bill 1123 \(2021\)](#)

The Indiana General Assembly also revised gubernatorial authority during the 2021 legislative session. House Bill 1123 allows the General Assembly to call itself into session upon the findings of the Legislative Council¹ that the governor has declared a state of emergency; the statewide emergency requires legislative action; and necessitates the convening of a special session to do so.^{xxiv} These broad requirements are designed to ensure that lawmakers have greater flexibility to respond to future

¹ The 16-member Legislative Council consists of the Senate president pro tempore, minority leader, majority and minority caucus chairs, the speaker of the House, minority leader, majority and minority caucus chairs, five majority appointees – three by the Senate president and two by the House speaker – and three minority appointees – one each by the Senate and House minority leaders, respectively.



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executive branch actions. The emergency session defined in this statute is limited to 40 calendar days from when both chambers convene and must adjourn within 10 days of the end of the declared state of emergency.^{xxv} Additionally, the agenda is limited to the items listed on the Legislative Council's resolution of findings.^{xxvi}

Additionally, HB 1123 creates a Legislative State of Emergency Advisory Group consisting of the Senate president pro tempore, Senate majority and minority floor leaders, Senate majority and minority caucus chairs, speaker of the House, House majority and minority floor leaders, House majority and minority caucus chairs, or their designees. The role of this group is to consult with and advise the governor's office on emergency executive orders, inform legislators about legislative responses to executive actions, and make recommendations regarding executive orders or proclamations. This advisory group can meet in-person or remotely and needs only the majority vote of the group members to submit a formal written proposal.^{xxvii}

Similar to the governor's arguments in neighboring Kentucky, the Indiana governor vetoed the legislation citing its unconstitutionality in interfering with the powers of a co-equal branch of government.^{xxviii} The General Assembly overrode the governor's veto. Subsequently, the governor filed a lawsuit asserting the governor's sole constitutional authority to convene special sessions. The matter is currently pending before the courts.^{xxix}

Georgia (Last revision, [House Bill 60](#) 2014)

In the last 40 years, Georgia has evolved to have a strong governor system of government. This is in part due to the latitude provided in the 1982 Constitution and in part cultural practice. The full extent of the governor's emergency powers are outlined in O.C.G.A. [§38-3-51](#).^{xxx}

Whereas many Southern states have created a classification system for the magnitude of any given disaster, Georgia only differentiates by subject matter.

In the event of actual or impending emergency or disaster of natural or human origin, or pandemic influenza emergency, or impending or actual enemy attack, or a public health emergency, within or affecting this state or against the United States, the governor may declare that a state of emergency or disaster exists.^{xxxi}

If the governor declares a state of emergency or disaster in any of the categories outlined by statute, the state and local governments' emergency plans are activated.^{xxxii} Although the governor is granted similar powers for each disaster/emergency declaration type, there are some unique qualities and limitations, especially during energy emergencies.



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The governor can utilize and enforce emergency management law and assume direct operational control of all "civil forces and helpers"^{xxxiii} in the state. The governor also is empowered to buy, sell, and/or temporarily commandeer property and distribute it around the state. State law further expands the governor's authority to suspend regulatory statutes "if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster."^{xxxiv} The governor can also assume control of any resource available to the state or local governments, make use of private property, or compel private health facilities to be managed and supervised by the state Department of Public Health. The governor can direct and compel evacuations of affected areas, prescribe routes and methods for evacuations, control entry and exit from affected areas, and establish emergency housing. Finally, the governor can suspend the sale of alcohol, combustibles, and explosives (firearms, parts, and ammunition are specifically exempted from this suspension).^{xxxv}

There are limitations if the emergency is solely related to an energy emergency. In this context, the governor cannot seize, commandeer, or condemn property or buy and sell land unless that property/land is an energy resource.^{xxxvi} In the event of a public health emergency, the governor may direct the state Department of Public Health to coordinate the response. If there is a vaccination or quarantine order, the statute explicitly outlines the due process and evidentiary standards to be applied and requires the state to bear the burden of proof - consistent with the judicial process outlined in the Constitution of the State of Georgia. Finally, state law specifically outlines that habeas corpus cannot be limited or restricted in a public health emergency.^{xxxvii}

When the governor declares an emergency, they are not always required to issue a call for a special legislative session to concur with the order. Public health emergencies represent an exception and require the governor to issue a call for the legislature to convene. Once a call is issued, the legislature must convene at 8:00 a.m. on the second day after the call to concur with the emergency declaration or terminate it. Disaster declarations are to last until the disaster is sufficiently dealt with or has ended.^{xxxviii} However, emergency declarations must not exceed thirty days unless reauthorized by the governor. The legislature is empowered to review or repeal the emergency at any time during the emergency.

The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time. Thereupon, the governor shall by appropriate action end the state of emergency or disaster.^{xxxix}

While state law allows the legislature to convene to terminate a disaster declaration at any time, the threshold required for doing so constitutes a significant hurdle. To assemble outside of a regular session, The General Assembly needs a call from the governor or three-fifths of its membership to concur that there is an emergency that warrants their convening. With the current structure of the chambers, this



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would require 34 of 56 Senators and 108 of 180 Representatives.²

The governor shall convene the General Assembly in special session for all purposes whenever three-fifths of the members to which each house is entitled certify to the governor in writing, with a copy to the secretary of state, that in their opinion an emergency exists in the affairs of the state. The General Assembly may convene itself if, after receiving such certification, the governor fails to do so within three days, excluding Sundays.^{xi}

Although Georgia has a strong governor model, the governor's powers can be checked by the Georgia General Assembly in times of disaster. State law places constraints on the governor's powers, and the legislature retains the ability to set more statutory checks on the governor in times of disaster. The Georgia General Assembly is also empowered to convene itself to terminate any state of emergency by the governor should they deem it necessary.

Conclusion

True to form, the states are the laboratory of democracy. Each state has taken a different approach to the emergency powers of the chief executive. Legislatures in 11 of the 15 CSG South states have the ability to call themselves into session. Of those states, only Florida does not require a majority of legislative members to make the call. Most require a supermajority of state legislators to call themselves into session or, in the recent cases of Arkansas and Kentucky, a specific set of conditions/circumstances.

In times of disaster and emergency, a clear plan and chain of command must exist. Some states delineate emergencies by severity, others by subject matter. Like Georgia, some have gone years without updating their state law, while others have decided that now is an appropriate time to curtail the governor's authority during public health emergencies. Given recent legislative actions, other states likely will continue to revisit this issue and develop new best practices for responding to disasters and states of emergency.

End Notes

ⁱ NCSL, "Special Sessions," National Conference of State Legislatures, accessed September 22, 2021, <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>.

ⁱⁱ Ibid.

ⁱⁱⁱ Arkansas Senate Bill 379 (2021), Section 9.

² Currently, the Georgia Constitution caps the Senate at 56 members and places a minimum of 180 members in the House of Representatives. It is conceivable that in the future these numbers could change without the need of a constitutional amendment.



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- ^{iv} Ibid, Section 2(c)(1).
 - ^v Ibid, Section 2(c)(2).
 - ^{vi} Ibid, Section 2(c)(3).
 - ^{vii} Ibid, Section 2(g)(1)(A) and (B).
 - ^{viii} Ibid, Section 2(g)(2).
 - ^{ix} Ibid, Section 2(g)(3)(A).
 - ^x Arkansas Code Annotated § 10-3-301.
 - ^{xi} Arkansas Senate Bill 379 (2021), Section 2(g)(3)(B)
 - ^{xii} Ibid, Section 2(g)(3)(C) through (E).
 - ^{xiii} Kentucky Senate Bill 1 (2021), Section 2(2)(a).
 - ^{xiv} Ibid, Section 2(2)(b).
 - ^{xv} Ibid, Section 2(3).
 - ^{xvi} Ibid, Section 2(4).
 - ^{xvii} Ibid, Section 2(5).
 - ^{xviii} Ibid, Section 3(1)(j).
 - ^{xix} Ibid, Section 3(2)(a) and (b).
 - ^{xx} Ibid, Section 3(4) and (5).
 - ^{xxi} Ibid, Section 4(2) and (3).
 - ^{xxii} Governor Andy Beshear, “*Veto Message from the Governor of the Commonwealth of Kentucky Regarding Senate Bill 1 of the 2021 Regular Session*,” Office of the Governor, Commonwealth of Kentucky, January 19, 2021.
 - ^{xxiii} Cameron v. Beshear, 2021-SC-0107-I (2021).
 - ^{xxiv} Indiana House Bill 1123 (2021), Section 4, Chapter 1.2, Sec. 7(a) through (c).
 - ^{xxv} Ibid, Section 4, Chapter 1.2, Sec. 9.
 - ^{xxvi} Ibid, Section 4, Chapter 1.2, Sec. 10.
 - ^{xxvii} Ibid, Section 4, Chapter 1.2, Sec.11.
 - ^{xxviii} Governor Eric J. Holcomb, “*Veto Message to Speaker Todd Huston Regarding House Bill 1123 of the 122nd General Assembly*,” Office of the Governor, State of Indiana, April 9, 2021.
 - ^{xxix} Holcomb v. Huston, et al.. 49D12-2104-PL-014068 (2021).
 - ^{xxx} Official Code of Georgia Annotated.
 - ^{xxxi} O.C.G.A. § 38-3-51 paragraph a.
 - ^{xxxii} O.C.G.A. § 38-3-51 paragraph b
 - ^{xxxiii} O.C.G.A. § 38-3-51 paragraph c, sub-section 1
 - ^{xxxiv} O.C.G.A. § 38-3-51 paragraph d, sub-section 1
 - ^{xxxv} O.C.G.A. § 38-3-51 paragraphs c and d.
 - ^{xxxvi} O.C.G.A. § 38-3-51 paragraph h
 - ^{xxxvii} O.C.G.A. § 38-3-51 paragraph i
 - ^{xxxviii} O.C.G.A. § 38-3-51 paragraph a.
 - ^{xxxix} Ibid.
 - ^{xl} Georgia Constitution, Article V, Section II, Paragraph VII, Sub-section b