

## Memorandum 2022-35

**Emergency-Related Reforms: Informational Report**

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In May 2020, in response to the COVID-19 pandemic, the Commission<sup>1</sup> decided to devote part of its resources to studying legal issues related to the public health crisis.<sup>2</sup>

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. Before beginning a study under this authority, the commission shall provide notice to legislative leadership and any legislative policy committee with jurisdiction over the proposed study topic and shall consider any formal or informal feedback received in response to the notice...<sup>3</sup>

The Commission commenced work on this topic in 2022.<sup>4</sup>

At its March 2022 meeting, the Commission directed the staff to proceed with preparation of an informational report on this topic.<sup>5</sup> Memorandum 2022-27 presented a proposed method and structure for the report and discussed alternative approaches related to the establishment of a state of emergency under the law.<sup>6</sup>

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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](http://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, pp. 2-5.

This memorandum, after a brief listing of the policy objectives for the emergency law analysis, addresses two issues raised at the Commission's May meeting (the remaining issues raised at that meeting will be addressed as they arise in the study).

Supplements to this memorandum will continue the discussion in Memorandum 2022-27 of different emergency law approaches. That discussion will focus next on laws involving powers and authorities during a state of emergency.

#### POLICY OBJECTIVES

Memorandum 2022-27 presented policy objectives for emergency laws.<sup>7</sup> These objectives are used in analyzing 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 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.
- *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.

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7. *Id.* at 2-3.

## DISCRETIONARY VS. MANDATORY RULES

At the May Commission meeting, there was some discussion about the character of different rules as authorizing discretionary action versus requiring mandatory action. This discussion provides a general description of the character of emergency law rules.

### Establishing a State of Emergency — Discretionary vs. Mandatory Rules

As discussed in Memorandum 2022-27, emergency laws in most jurisdictions<sup>8</sup> typically empower the Governor (and, in a few cases, the Legislature) to proclaim a state of emergency.<sup>9</sup> The initial decision on whether to commence a state of emergency seems to be fundamentally a discretionary one.<sup>10</sup> This appears to be true even in cases where the law contains mandatory language. For instance, in Rhode Island, the law provides that “[a] state of emergency *shall* be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent.”<sup>11</sup> In this case, the finding that would require declaration of a state of emergency is one made by the Governor. And, the decision of whether to make such a finding appears to be a discretionary one.

The law may require that certain actions be taken after a state of emergency is proclaimed or specify required formalities for the proclamation.<sup>12</sup> The mandatory requirements that the staff has identified to date are primarily procedural or administrative. For example, in some states, the issuance of a state of emergency proclamation can obligate the Governor to call the Legislature into special session.<sup>13</sup> Or, the Legislature may be obligated to take a vote on the continuation of the state of emergency within a specified timeframe.<sup>14</sup>

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8. See *id.* at 3-5.

9. See *id.* at 5-7.

10. See, e.g., discussion of “Who Proclaims a State of Emergency?” in Memorandum 2022-27, pp. 5-7.

11. R.I. Gen. Laws Ann. § 30-15-9(b) (emphasis added); see also *id.* § 30-15-1(1) (defining “disaster” as “occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man made cause...”).

12. See, e.g., discussions of “In Writing” and “Requirement that Governor Call Special Session on State of Emergency Proclamation” in Memorandum 2022-27.

13. See, e.g., discussion of “Requirement that Governor Call Special Session on State of Emergency Proclamation” in Memorandum 2022-27.

14. See, e.g., N.H. Rev. Stat. Ann. § 4.45(II)(d) (“...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?’”).

Going forward, the staff will continue to look for different discretionary and mandatory rules in emergency laws and present those different rules as alternative approaches.

### **Policy Considerations for Discretionary vs. Mandatory Rules in Emergency Law Generally**

In general, the different character of emergency law rules (as discretionary vs. mandatory) involves trade-offs between the following policy objectives:

- *Certainty.* Mandatory requirements provide more certainty about what should happen, when, and under what circumstances. In emergency law, providing certainty can be particularly challenging, as emergencies can involve unusual and unanticipated circumstances.
- *Feasibility.* Discretionary rules provide more flexibility to determine whether to act, thereby avoiding situations where the law requires actions that are infeasible.
- *Speed and Nimbleness.* Mandatory requirements limit flexibility. This may be problematic when emergency conditions preclude compliance with the requirements or satisfying the requirements causes significant delays to emergency response.

#### LIMITATIONS ON STATE OF EMERGENCY DECLARATIONS AND POWERS, GENERALLY

At its meeting in May, the Commission also discussed the importance of ensuring that emergency declarations are not issued (and emergency powers are not invoked) in non-emergency situations.

### **Approaches to Avoiding Misuse of Emergency Powers**

Avoiding misuse of emergency powers is an important policy goal and can be addressed in two general ways:

- (1) The law could place limitations on the front end, by preventing action unless certain substantive requirements or procedural steps are first satisfied. These types of limitations could include restrictions in the definition of “state of emergency,” required findings/evidence/documentation to support proclamations or emergency actions, or required approvals before making a proclamation or taking emergency actions.
- (2) The law could provide for responsive oversight, permitting quick action when the person or entity responsible for oversight concludes that the action is unwarranted. The mechanisms for oversight could include limiting the duration of proclamations or emergency orders, requiring that a separate person or entity

approve extensions of an emergency proclamation or order, or empowering a separate person or entity to terminate an emergency proclamation or order.

### **Avoiding Misuse of State of Emergency Proclamation**

Laws related to the proclamation of a state of emergency typically include some up-front limitations,<sup>15</sup> but seem, on the whole, to lean in favor of initial flexibility and quick action. This makes sense in an emergency, where rapid response can be particularly important. However, this means that emergency law relies more heavily on responsive oversight after the state of emergency has been proclaimed.<sup>16</sup>

### **Policy Considerations Related to Avoiding Misuse**

Avoiding misuse is not separately listed as a policy objective in the analysis in this study. However, three other policy objectives — certainty, information input and output, and oversight — are strongly related to the broader goal of avoiding misuse of emergency authority. Specifically, the relationships between these individual policy objectives and the broader concern of avoiding misuse are described in more detail below:

- *Certainty.* Laws that provide certainty help to ensure that the circumstances where action can or should be taken are clearly defined. With more certainty, the situations where misuse is occurring will be well defined and more easily identifiable.
- *Information Input and Output.* Laws that require information distribution or notice help to provide transparency, which can both deter misuse and promote accountability.

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15. See, e.g., Gov't Code §§ 8558(b) (defining “state of emergency”), 8625; see also generally Memorandum 2022-27, pp. 5-18.

16. The Legislature is typically empowered to take action to terminate the state of emergency and, in some circumstances, terminate individual emergency actions. See generally the discussion of “Legislative power to terminate governor's declaration by state” at [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) (Note – discussion is as of April 7, 2021); see also, e.g., Cal. Gov't Code § 8629 (state of emergency can be terminated “by concurrent resolution of the Legislature declaring it at an end.”); Fla. Stat. Ann. § 252.36(3)(a) (At any time, the Legislature, by concurrent resolution, may terminate a state of emergency or any specific order, proclamation, or rule thereunder.”).

And, some emergency laws provide duration limits for state of emergency proclamations. See, e.g., Kan. Stat. Ann. § 48-924(b)(4) (terminate after 15 days, unless ratified by Legislature); see also generally discussion of the laws of Maine (default duration of 30 days, can be extended by Governor), Michigan (default duration of 28 days, extensions require legislative approval), Montana (default duration of 45 days, extension beyond that requires legislative approval) at <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>.

- *Oversight.* Laws that provide oversight can focus either on preventing problematic actions or responding when problematic actions are taken. As indicated above, reliance on responsive oversight can allow for more rapid emergency response initially. Responsive oversight may not prevent misuse altogether, but it provides a way to end the misuse and limit its impact.

#### ADMINISTRATIVE MATTERS: STAKEHOLDER OUTREACH

As indicated at the Commission's May meeting, the staff has sent initial emails to all of the entities listed in the Exhibit to Memorandum 2022-27.

Although it was not noted in Memorandum 2022-27, notification letters were also previously sent to California Native American Tribes, pursuant to the Commission's Tribal Consultation Policy.

#### NEXT STEPS

The staff will supplement this memorandum and provide policy analysis of different approaches related to emergency powers and authorities.

Respectfully submitted,

Kristin Burford  
Staff Counsel