COVID-19: Focus on Emerging Constitutional Challenges

April 15, 2020

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How to Use WebEx Q & A

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Moderator

Kayleen Klarich, Marketing and Membership Manager, the Network for Public Health Law – National Office

- Areas of expertise:
  - Development and execution of marketing strategies
  - Management of organizational membership programs
Presenter

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- J.D., Salmon P. Chase College of Law (KY)
- LL.M., Georgetown University Law Center
- Research interests/areas of expertise:
  - Emergency Legal Preparedness & Response
  - Vaccinations
  - Preemption
  - Emerging Infectious Diseases
  - Constitutional Rights and Structural Principles
Emergency Legal Preparedness in Response to COVID-19: Focus on Constitutional Issues

April 14, 2020

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Acknowledgements

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Contents

• COVID-19 Epi and Emergency Assessments
• Constitutional Balancing
  • Structural facets
  • Rights-based issues
• Assessment of Constitutional Challenges
• Questions/comments
COVID-19 Global Distribution

Total Confirmed Deaths >=: 120,450 = Mortality Rate 6.2%
Total Confirmed Cases >=: 1,930,780

U.S. Cases of COVID-19

Total Confirmed Cases > 587,173  Total Deaths > 23,644

Public health authorities, powers, liabilities & immunities vary depending on the type of emergency declared at each level of government.

<table>
<thead>
<tr>
<th>International</th>
<th>WHO Public Health Emergency of Int’l Concern</th>
<th>Emergency Declarations by Foreign Governments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>January 30, 2020</td>
<td>Ongoing</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Federal</th>
<th>Stafford Act or National Emergencies Act</th>
<th>HHS Public Health Emergency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>March 13, 2020</td>
<td>January 31, 2020</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State/Tribal</th>
<th>Emergency or Disaster</th>
<th>Public Health Emergency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>Local</th>
<th>Emergency or Disaster</th>
<th>Public Health Emergency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
COVID State and Select Tribal/Local Declarations of Emergency

Click on the **date** of each state to view declarations

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**Emergency - 33**
- California
- Washington
- Texas
- Florida
- New York
- New Jersey
- Georgia
- North Carolina
- Pennsylvania
- Michigan
- Illinois
- Ohio
- Indiana
- Missouri
- Alabama
- Louisiana
- Kansas
- Virginia
- Maryland
- Colorado
- Arizona
- Nevada
- Oregon
- Washington
- Hawaii

**Disaster - 4**
- Alaska
- Puerto Rico
- Virgin Islands

**Public Health Emergency/Disaster - 9**
- Arizona
- California
- Florida
- Hawaii
- Illinois
- Louisiana
- Nevada
- New York
- Texas

**Emergency + Public Health Emergency - 4**
- Arizona
- California
- Florida
- Hawaii

**County/City**
- Santa Clara Co.
- Orange Co.
- San Francisco City
- San Diego Co.
- Bexar Co.
- Travis Co.
- Seattle
- King Co.
- Long Beach
- Orange Co.
- San Diego Co.

**Tribal**
- Lummi Nation
- Hoopa Valley Tribe

**See here for updates re: jurisdictional requests for FEMA disaster relief**

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**Co. of Hawai‘i**
- 2/28
- Honolulu Co.
- 3/4
- Maui, Ka‘u‘i

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**Key**
- AK – Alaska
- HI – Hawaii
- PR – (Puerto Rico)
- VI – (Virgin Islands)

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**Legal Triage**: efforts of legal actors & others during declared emergencies to build a favorable legal environment by prioritizing issues & solutions facilitating legitimate public health responses.
Emerging Legal Issues

Topics

- Emergency Powers - Triage
- Crisis Standards of Care
- Social Distancing Measures
- Privacy
- Liability
- Surveillance & Reporting
- Testing/Screening/Treatment
Social Distancing Measures

- Control modes of transportation
- Increase distance among workers
- Shelter-in-place/Lockdown
- Dismiss schools
- Curfew
- Restrict public gatherings
- Evacuation
- Isolation & quarantine
• COVID-19 Epi and Emergency Assessments
• Constitutional Balancing
  • Structural facets
  • Rights-based issues
• Assessment of Constitutional Challenges
• Questions/comments
The U.S. Constitution divides government power into Federal, State & Local branches, and separates the legislative, executive, and judicial branches. It protects individual rights from government interference, including:

- Freedom of Expression & Assembly: 1st Amdt.
- Due process rights to life, liberty, or property: 5th and 14th Amdts.
- Rights against cruel and unusual punishment: 8th Amdt.
- Equal Protection: 14th Amdt.
- Right to privacy: 5th, 9th, 14th Amdts.
- Rights to travel
- Right to bear arms: 2nd Amdt.
- Takings: 5th Amdt.
Array of Constitutional Issues

- Separation of Powers
- Federalism
- Supremacy
- Preemption
- Judicial Deference
- Freedom of Expression
- Freedom of Assembly
- Freedom of Religion
- Due Process
- Right to Privacy
- Equal Protection
- Right to Travel
- Right to Bear Arms
- Cruel & Unusual Punishment
- Takings
Structural principles and individual rights intersect regularly in authorizing or limiting public health powers and duties across all levels of government.
Use of individual-rights arguments to counter structural limitations

*Jacobson v. Massachusetts* (1905)

Judicial review is appropriate in emergencies “if a statute purporting to have been enacted to protect the public health, . . . has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights . . . .”
CONSTITUTIONAL COHESION AND THE RIGHT TO PUBLIC HEALTH*

James G. Hodge, Jr., J.D., LL.M.**
Daniel Aaron***
Haley R. Augur****
Ashley Cheff*****
Joseph Daval******
Drew Hensley*******

Despite years of significant legal improvements stemming from a renaissance in public health law, Americans still face major challenges and barriers in assuring their communal health. Reversals of legal reforms coupled with maligned policies and chronic underfunding contribute to diminished public health outcomes. Underlying preventable morbidity and mortality nationally are realities of our existing constitutional infrastructure. In essence, there is no general obligation of government to protect or promote the public’s health. Under principles of “constitutional cohesion,” structural facets and rights-based principles interwoven within the Constitution protect individuals and groups from governmental vices (i.e., oppression, overreaching, tyranny, and malfeasance). Structural impediments and rights infringements provide viable options to challenge governmental efforts inapposite to protecting the public’s health. Through corollary applications framed as auxiliary, creative, and ghost righting, courts are also
Constitutional Recalibration

Individual Interests
- Privacy
- Religious Freedoms
- Due Process
- Equal Protection

Communal Interests
- Surveillance
- Treatment
- Isolation & Quarantine
- Curfews & Closures

Emergency Preparedness and Response
<table>
<thead>
<tr>
<th>LEVEL</th>
<th>EQUAL PROTECTION</th>
<th>SUBSTANTIVE DUE PROCESS</th>
<th>REQUIRES</th>
</tr>
</thead>
<tbody>
<tr>
<td>STRICT</td>
<td>Race, national origin/ethnicity, Suspect classes</td>
<td>Fundamental rights: procreation, travel, marriage</td>
<td>Compelling government interest + narrow tailoring</td>
</tr>
<tr>
<td>HEIGHT-ENED</td>
<td>Gender, illegitimate children; quasi-suspect classes</td>
<td>Quasi-fundamental rights (bodily integrity)</td>
<td>Substantial relationship to important gov’t objective</td>
</tr>
<tr>
<td>MINIMAL (RATIONAL BASIS)</td>
<td>Any other infringement</td>
<td>All other classifications</td>
<td>Rational relationship to legitimate state interest</td>
</tr>
</tbody>
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A Chorus of Claims

Suit challenges ban on large crowd events in NH

By Kevin Landrigan New Hampshire Union Leader   Mar 19, 2020

ACLU files 1st coronavirus curfew lawsuit in Puerto Rico

Utah groups sue to force more prison and jail inmate releases due to coronavirus

By MARK SHENEFELT Special to the Daily Herald   Apr 3, 2020   0

Coronavirus In Pennsylvania: Attorney Files Lawsuit Against Gov. Tom Wolf For Non-Essential Classification

Abortion protesters sue Gov. Whitmer for alleged violation of her stay-at-home order

Kentucky woman wants to see family. She sues over Beshear COVID-19 travel restrictions
COVID Constitutional Issues – Honorable Mentions

- Home Rule Limitations in South Carolina
- Questioning Stay Home Orders in Idaho
- Ankling Recalcitrants in Kentucky
- Revisiting Rights of the Accused in Texas
- Church Receipt of COVID Funds in DC
- Habeas Corpus for Juveniles in New York
- Challenging Beach Closings in Florida
- Rights to Assemble in New Hampshire
COVID Con Law Issues – Top 10

Quarantine & Isolation
Gun Shop Closures
Airport Assessments
Reproductive Rights
Prisons
Takings
Travel Limits
National v. State Powers
Religious Congregations
Crisis Standards of Care

Top 10

Washington (WA)
California (CA)
Arizona (AZ)
Texas (TX)

Sandra Day O'Connor College of Law
Arizona State University
Center for Public Health Law & Policy
April 13: “[S]ome in the Fake News Media are saying that it is the Governors decision to open up the states, not that of the President . . . Let it be fully understood that this is incorrect . . . It is the decision of the President, and for many good reasons. . . . A decision by me, in conjunction with the Governors . . . will be made shortly!”
April 7: Governor Doug Ducey issues Executive Order 2020-24 authorizing immediate self-quarantine or self-isolation for travelers arriving at AZ airports from areas with substantial community transmission, including NY, CT, and NJ, in coordination with airport authorities.
March 28: Seattle & King County Health Department issues Quarantine Directive and Isolation Order mandating that persons testing positive for COVID-19 self-isolate and persons with COVID-19 symptoms self-quarantine. **Non-compliers** could face involuntary detention.
March 29: Despite Hillsborough County’s stay-at-home order, Rev. Rodney Howard-Browne held 2 large church services in Tampa and was arrested on “misdemeanor charges of unlawful assembly and violating quarantine orders.” On April 1, Gov. Ron DeSantis issued E.O. 20-91 imposing a stay-at-home order but exempting religious services.
March 20: Governor Gavin Newsom issues E.O. 202.6 closing non-essential businesses. L.A. County Sherriff interprets the order to include retail gun shops (later rescinding this interpretation). On March 27, NRA and others challenge Gov. Newsom’s closures. On April 6, U.S. district court denies request for temporary restraining order against the E.O.
March 23: After Governor Wolf issues E.O. closing non-essential business on March 19, manufacturer Schulmerich Bells files class-action lawsuit alleging that forced business closures implicating lost revenue and wages constitute a government “taking” of private property without compensation and violate substantive and procedural due process.
April 2: Class-action lawsuit filed against Gov. Pritzker and Dept. of Corrections allege failure to take necessary precautions to reduce spread of COVID-19 within prisons, where public health and medical care programs are incapable of controlling the virus among vulnerable populations.
March 24: Alabama Disabilities Advocacy Program files complaint with HHS OCR challenging the state’s EOP listing several health conditions (severe mental retardation, dementia, severe traumatic brain injury) for which providers should not issue ventilators based on 2010 CSC guidance. On April 8, Alabama formally rescinds its guidelines in response to OCR.
March 22: Gov. Greg Abbott issues E.O. GA-09 banning nonessential medical procedures including surgical abortions, leading to a lawsuit by reproductive rights advocates on March 25. On April 7, the 5th Circuit Court of Appeals rejects temporary restraining order, allowing the E.O. to remain in place. U.S. Supreme Court to consider the case.
Conclusion

• Ask the Network for more information or ongoing COVID-19 legal response efforts

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Public Health Decision-Making During the COVID-19 Pandemic
1:00 – 2:00pm EST | April 23

COVID-19: Real-Time Guidance, Resources and Information
View resources & request assistance at networkforphl.org/covid19

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