



The NEW ENGLAND JOURNAL of MEDICINE

Perspective

The Legal Authority for States' Stay-at-Home Orders

Mark A. Hall, J.D., Michelle M. Mello, J.D., Ph.D., and David M. Studdert, LL.B., Sc.D.

In March 2020, when many U.S. states and localities issued their first emergency orders to address Covid-19, there was widespread acceptance of the government's legal authority to respond

quickly and aggressively to this unprecedented crisis. Today, that acceptance is fraying. As initial orders expire and states move to extend or modify them, legal challenges have sprouted.¹ The next phase of the pandemic response will see restrictions dialed up and down as threat levels change.² As public and political resistance grows, further legal challenges are inevitable.

The shape of these challenges is already morphing (see table). Early cases alleged that stay-at-home orders violate individual rights. Some were broad-gauged, invoking constitutionally protected liberty, but these consistently failed because of the entrenched precedent that general social and economic freedoms yield to public protection in a health crisis. Others have been smaller-bore, target-

ing particular domains that might have stronger constitutional protection, such as churches, abortion clinics, courthouses, election rallies, gun shops, and health facilities. Although a few of these have succeeded, courts have quickly dispatched most, recognizing that all settings require protection.¹

That legal landscape changed dramatically on May 13. In *Wisconsin Legislature v. Palm*, the Wisconsin Supreme Court completely struck the state's renewed stay-at-home order, ruling that the state secretary of health had imposed it improperly. Trial courts in Ohio and Oregon have ruled similarly. Ruling in favor of governors' authority, however, are several Michigan trial courts and the Pennsylvania Supreme Court. While public discourse about Covid-19-related restrictions remains focused on

individual liberties, these newer challenges assail public health officials' fundamental authority to act without legislative approval or other procedural safeguards. What's at stake in these cases, and what are their implications for public health responses during pandemics?

The Wisconsin decision is colorful; it proclaims the need to guard against "tyrannical" government "overreach" and calls the secretary of health an "unelected and unaccountable bureaucrat" who "unilaterally" exercised "controlling, subjective judgment" to "arrogate unto herself" a "vast seizure of power." Despite this rhetoric, the decision's core is a technical ruling that the health department didn't follow statutorily prescribed procedures. Nonetheless, the majority suggested that not following these procedures amounted to more than a statutory violation: without them the state's public health emergency powers might be unconstitutional. Going further, two justices wrote

Legal Challenges to Public Health Orders.*	
Type of Challenge	Examples
Constitutional	
Individual rights	Order denies general liberty rights to movement or to pursue a business or occupation. Order infringes rights to engage in specific activities such as worship, abortion, speedy trial, or political advocacy.
Separation of powers	Legislature delegated too much authority to governor or health officials.
Statutory	
Scope of agency's authority	Health officials' authority to impose disease-control restrictions (e.g., quarantine) does not allow more sweeping stay-at-home order.
Procedural defect	Health officials failed to follow statutorily required procedures for agency rulemaking.

* Ballotpedia¹ provides examples of each type of challenge and full citations to cases discussed in the text.

separately that even strict procedural compliance would not suffice because the legislature lacks constitutional power, even in unanticipated emergencies, to delegate authority for extended stay-at-home orders; such a large delegation of authority, they said, violates the constitutionally required separation of powers by allowing the executive branch to create law. Although this ruling purports to address only the secretary of health, in principle the separation-of-powers objection also applies to the governor. Indeed, challenges pending in several other states press this point against governors' orders.

To prevent officials from trampling civil liberties during emergencies, some checks on their power are essential, but we believe the Wisconsin court grossly misapprehended how such checks ought to function. Emergency-powers statutes necessarily expand executive-branch authority during declared emergencies by delegating legislative "police powers" to the governor and health officials.³

One way to protect the public against abuses is to construe this delegation narrowly, insisting that officials can't do anything the statute doesn't expressly permit. A second approach is to require procedural steps before officials can issue orders. A third is to hand the executive branch broad discretion but cabin its exercise through time limits or substantive standards reviewable by courts.

The Wisconsin court strained to apply the first two approaches and gave the third short shrift. First, it held that the secretary of health's stay-at-home orders exceeded her statutory authority by going beyond the quarantine power's conventional focus on infected and exposed persons. This ruling is deeply unsettling because public health experts have assumed that extensive "legal preparedness" efforts following previous crises assure that ample executive authority is on the books. Covid-19 does present unprecedented challenges. Asymptomatic transmission coupled with the early lack of adequate testing required novel, last-

resort responses not explicitly anticipated by even the most updated public health statutes. Community-wide shelter-in-place orders and business closures are more akin to powers governors (or mayors) exercise during civil unrest or natural disasters than in response to epidemics. Recognizing these realities, other courts have accepted highly restrictive orders by construing the Covid-19 pandemic as a type of natural disaster, or by relying on nonspecific public health provisions that permit all necessary measures. The Wisconsin court, by contrast, feared that interpreting existing statutes so broadly would hand an executive-branch agency too much power; in doing so, it ignored centuries of experience to the contrary.

Second, the Wisconsin court held that the secretary of health was required to undergo a formal rulemaking process before entering statewide orders. The majority characterized the stay-at-home order as a general "rule," which triggers a process of first notifying and receiving feedback from the public, rather than a situation-specific "order," which does not. The distinction can be fuzzy, but the court's analysis was tortuously unforgiving. It gave no weight to the order's temporary nature and seized on arguments the litigants hadn't made. Most perplexing, instead of excising parts of the order that it found troubling (e.g., criminal sanctions), it struck the entire order — and refused to allow the time that all parties, and even a majority of the justices, wanted for rectifying defects.

Procedural technicalities won't pose such formidable obstacles everywhere. Some states' statutes

automatically suspend all laws inconsistent with emergency orders, and most others give governors emergency power to suspend normal procedures for conducting state business “if strict compliance . . . would in any way prevent, hinder, or delay” actions needed to address an emergency.⁴ However, about a dozen states, including Wisconsin, allow suspension only of regulations, not statutes — a distinction that could seriously handicap disaster response. Wisconsin allows abbreviated “emergency rulemaking,” but that truncated process can still take several weeks, a potentially devastating delay. A recent study estimates that 89% of U.S. deaths could have been averted if states had implemented stay-at-home orders 2 weeks earlier.⁵ It is shocking to suppose that procedural niceties warrant such a death toll.

In contrast, Michigan trial courts have placed more emphasis on the third route to preventing abuses of power: statutory constraints on executive-branch discretion. Emergency-power statutes usually specify that declarations are time-limited and subject to legislative override, but some do not. Michigan has one statute of each type. Accordingly, Governor Gretchen Whitmer limited her initial order to 28 days, but after the legislature declined an extension, she imposed a second order under a different statute that required no time limit. Two Michigan courts relied in part on the time limit to uphold the first or-

der. A subsequent decision upheld the renewed order, pointing to three other statutory safeguards: standards for what constitutes an emergency, allowing other officials to weigh in, and requiring that emergency orders meet judicially reviewable standards of being “reasonable” and “necessary” to address the threat.

Michigan courts thus believed that the legislature, when crafting emergency-powers statutes, reckoned with the difficult trade-off between preventing abuses of power and giving officials speed and flexibility to respond to unpredictable emergencies. These courts took seriously various legislatively crafted safeguards that public health orders must satisfy, such as time limits, substantive standards, and judicial review.

Contorting a statute’s language to demand additional procedural steps or omit needed authority — as the Wisconsin court did — is neither valid nor necessary. States have always had broad emergency powers, and legislatures have carefully reevaluated these laws over the past 20 years after terrorist attacks, natural disasters, and epidemics, ensuring that civil liberties protections are included. Though these statutes are being tested in new ways, they have proved durable enough to protect against abuses of power. Their core framework — holding officials accountable for demonstrating that orders are reasonable and necessary — has been a robust scaffold for assessing the legality of public health orders for

more than a century, since it was announced in the seminal Supreme Court case of *Jacobson v. Massachusetts*. In addition to recognizing the need to give officials flexibility to implement forceful public health interventions, *Jacobson* recognized that administrative agencies are both nimbler and more expert than legislatures. In upending this framework, the Wisconsin court did more than disrupt settled understandings of the law: it hobbled the state’s ability to save lives.

Disclosure forms provided by the authors are available at NEJM.org.

From Wake Forest University Schools of Law and Medicine, Wake Forest, NC (M.A.H.); and Stanford Law School and Stanford University School of Medicine — both in Stanford, CA (M.M.M., D.M.S.).

This article was published on June 3, 2020, at NEJM.org.

1. Ballotpedia. Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020. 2020 ([https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020)).
2. Studdert DM, Hall MA. Disease control, civil liberties, and mass testing — calibrating restrictions during the Covid-19 pandemic. *N Engl J Med*. DOI: 10.1056/NEJMp2007637.
3. Rossi J. State executive lawmaking in crisis. *Duke Law J* 2006;56:237-77.
4. Sunshine G, Thompson K, Menon AN, Anderson N, Penn M, Koonin LM. An assessment of state laws providing gubernatorial authority to remove legal barriers to emergency response. *Health Secur* 2019;17:156-61.
5. Pei S, Kandula S, Shaman J. Differential effects of intervention timing on COVID-19 spread in the United States. May 15, 2020 (<https://www.medrxiv.org/content/10.1101/2020.05.15.20103655v2>). preprint.

DOI: 10.1056/NEJMp2019662

Copyright © 2020 Massachusetts Medical Society.