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COVID-19 PANDEMIC: POLICY AND LEGAL ISSUES

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When President Trump equated America's response to the Coronavirus Pandemic to a nation's response to a world war, he was not far off the mark. Not only were large swaths of the economy closed starting in March 2020, the Pentagon mobilized to combat the spread of the deadly virus and treat the sick.

This included the use of the Army Corps of Engineers to set up hospital tents, the Navy's deployment of two military hospital ships—one to New York and one to California, hotspots for the virus—and federalizing the National Guard. The President also invoked the Defense Protection Act, directing US private sector industries to increase the production of critical medical equipment and supplies—a move not seen since World War II.

Most Americans are unfamiliar with governmental powers during a pandemic, which makes it useful to examine applicable legalities, powers and authorities. Importantly, that power can mandate quarantine, isolation, vaccination, decontamination, destruction of infected property, eviction, closing businesses, social distancing, sheltering in place, specimen testing, and mandating health information disclosure and health care responses.

Defining the Threat

Easily spread diseases via contact between humans, animals or insects are infectious or communicable diseases.

Communicable diseases spread by physical contact, e.g., sexual intercourse, fecal/oral transmission or droplets that travel through the air. Such diseases can rapidly spread, mutate or adapt to stifle vaccines.

Although COVID-19 originated in China in 2019, the Chinese were not candid

about the disease being communicable. When the virus moved to other nations, emergency rooms sounded the alarm. While President Trump's ban on flights from China was wise and helped a bit, it was too late. The President and state governors had to invoke their police powers to ensure the safety of Americans.

Police Powers

The US Constitution grants states the power to regulate the health, safety and welfare of its citizens. This is known as police powers and is specifically reserved to the states by Amendment X, i.e., "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

These powers allow states to develop rules, regulations, policies, procedures and plans in response to highly communicable disease within their borders, though responses may vary. However, since communicable diseases do not recognize state borders, the Federal government has overarching authority.

Executive Orders and Presidential Directives

Historically, the Federal government's domestic efforts focused on the most harmful communicable biological agents. It may only act if the

communicable disease is in Presidential Executive Order (EO) 13295, as amended by EO 13375 (April 2005). This EO lists all the communicable diseases mandating Federal action, e.g., the coronavirus:

Cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (Marburg, Ebola, and Congo-Crimean), Severe Acute Respiratory Syndrome (SARS),



and influenza caused by novel or reemerging influenza viruses that are causing or have the potential to cause a pandemic.

If naturally-occurring diseases spread past a given state's borders or are introduced into the United States from travelers from foreign locations, the Centers for Disease Control (CDC), a part of the Department of Health and Human Services (HHS), has the authority to assert Federal authority under Title 42 (Public Health and Welfare) U.S.C. § 264. Using this authority is at the discretion of the US Surgeon General, as approved by the HHS Secretary. Once the CDC exercises its authority, the Code of Federal Regulations (CFR) provides the CDC a variety of tools, e.g., in Parts 70 (Interstate Quarantine) and 71 (Foreign Quarantine) of Title 42 (Public Health).

In addition, President George W. Bush signed Homeland Security Presidential Directive 5 (HSPD-5) on 28 February 2003, which resulted in the regularly updated 2004 National Response Plan (NRP). It outlines a national system for prevention, preparedness, response and recovery in the event of any national disasters, including a pandemic. If a biological outbreak occurs in the US, the NRP Biological Incident Annex supplies the guiding procedures and policies used by Federal agencies to aid state, local and tribal governments.

Responding to Biological Outbreaks

Governmental responses to biological outbreaks must be prompt, strong and effective. Thus, governors may order isolation, quarantine or social distancing. Federally, 42 U.S.C. § 264, paragraph (a) Promulgation and enforcement by Surgeon General, says:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

This authority helps prevent the spread of said communicable diseases across state lines. Also, Section 70.6 of Title 42 of the CFR permits the "detention, isolation, quarantine, or conditional release of individuals," also to prevent the spread of the communicable diseases listed. In addition, Part 71 of Title 42 of the CFR permits the detention, isolation and quarantine of individuals, goods, animals and other items at ports and airports to prevent the introduction or spread of the listed diseases.

Using Quarantines

Quarantines are key tools used by governmental agencies to prevent the spread of communicable diseases to new individuals. The Turning Point Model Public Health Act defines quarantines as:

The physical separation and confinement of an individual or groups of individuals, who are or may have been exposed to a contagious or possibly contagious disease and who do not show signs or symptoms of a contagious disease, from non-quarantined individuals, to prevent or limit the transmission of the disease to non-quarantined individuals.

Quarantine may restrict individual movements and the actions of those who are not ill and those exposed to the disease. Isolation of individuals who are infected or ill from the communicable disease is more restrictive. A quarantine's goal is to separate people who are potential or actual carriers of communicable diseases from encountering those individuals who have not encountered the disease. Quarantines slow or prevent the spread of communicable diseases during incubation periods when individuals do not exhibit symptoms. During the 2003 Severe Acute Respiratory Syndrome (SARS) virus outbreak, nations implemented quarantine procedures.

The Federal authority to establish quarantines helps prevent introducing, transmitting or spreading communicable diseases. Using their police powers, states can direct quarantines and shelter in place for non-essential personnel during communicable disease outbreaks in states, though such orders are not always mandatory. During COVID-19, states issued voluntary quarantine requests to individuals suspected of exposure to this disease.

Legal concerns involving quarantines and



sheltering in place arise only when the government issues mandatory orders. Amendment XIV guarantees no person shall be deprived of life, liberty or property without due process of law. The Supreme Court interprets the preservation of due process to include a balancing test weighing private interests against government interests. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), was a case about required smallpox vaccinations. The Court held:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

While the individual right to due process and freedom against physical restraint are not absolute, the government may not impose mandatory quarantine orders without restraint. In every instance of quarantine, the government and the courts that review governmental actions will have to weigh individual interests in privacy, freedom and due process against the government's interests in protecting the safety and health of all citizens.

In *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380 (1902), the Court held:

Congress recognized that from the earliest days, the power of the states to enact and enforce quarantine

laws for the safety and the protection of the health of their inhabitants. That until Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce, is not an open question.

Closing Thoughts

The COVID-19 Pandemic after action report will likely reveal that the US was not as prepared as it should have been. On the other hand, the world community, to include the UN's World Health Organization, was even less prepared.

In addition, other legal concerns will arise when government officials consider preventative and containment measures. Since government officials may infringe on individual civil liberties when implementing the actions available to them, they must abide by the limitations, safeguards and oversight provisions designed to protect individual rights. The goal here is always to ensure that US citizens are safe from any given crisis and free from an overactive governmental response. ★

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