Executive Decision Making for COVID-19: Public Health Science through a Political Lens

Peter D. Jacobson, JD, MPH, University of Michigan; Denise Chrysler, JD, The Network for Public Health Law; Jessica Bresler, JD, Northeastern University

SUMMARY. Executive decision making is the crux of using law to achieve public health objectives. But public health codes and emergency declaration laws are not self-executing. In this chapter, we examine how elected officials and public health officers have used their legal authority to address the COVID-19 pandemic. We begin with an overview of an executive decision-making tool for public health officials. Then we describe the general legal background in which these decisions have been made. Next, we apply the decision-making tool to how governors in eight states have determined whether to issue stay-at-home orders and when to relax these restrictions. In this section, we focus on the criteria governors used to re-open the state's economy and additional restrictions, such as mask wearing, as a condition of reopening. We examined the states' political party control, the use of public health science, and equity considerations. We conclude that the COVID-19 response represents federalism at work, with considerable variation across the sample states, and that the public health science is filtered through a very thick political lens. In short, governors making political decisions drove the process, not public health officials relying on the best available science. We conclude with recommendations for future action.

Introduction

Governors and local elected officials are using their legal authority to issue a range of emergency orders to combat the spread of COVID-19. These orders include stay-at-home requirements, mask wearing in public, and closing non-essential businesses. In most instances, elected officials are relying on state and local public health professionals to provide advice on whether to issue a particular set of restrictions and when to relax or terminate the order.

Addressing situations posing a threat to the community's health is the core of a public health director's decision-making responsibility. As the health officer for a state, Tribal, county, or local health department, the executive is called upon to use professional judgment, informed by scientific evidence, to take the best course of action within the agency's legal authority or make appropriate recommendations to elected officials.

This chapter focuses on how public health officials exercise that judgment in working with elected officials to mitigate the spread of COVID-19. Because the pandemic spreads differently across and within states, COVID-19 demonstrates the importance of the relationship between science and politics. But COVID-19 also illustrates the difficulty of decision-making with a novel virus and rapidly changing advice from federal governmental virologists and public health officials.

The Executive Decision-Making Tool

As we discuss below, elected officials and public health leaders have considerable discretion under most state public health codes in which their decisions must be made. To exercise their broad grant of authority, the executive must ask three key questions: Can I? Must I? Should I?

Can I? focuses on whether the agency has the legal authority to act, and if so, in what way? The public health agency's authority is based on the police power, which provides the authority for states to protect the public's welfare, safety, and health (*Jacobson v. Commonwealth of Massachusetts*, 1905). The parameters of authority are broad, but include constitutional safeguards for individual rights to liberty and due process.

Must I? asks whether there are legal requirements, including funding source directives, that mandate action and define how the agency must act? Usually, the agency has considerable discretion in deciding how to fulfill its obligation. Even if the agency must act, the activity need not address every aspect of the problem—selective action is permissible, absent bias or otherwise impermissible motives (*Youngberg v. Romeo*, 1982).

Should I? is a policy question requiring the executive to determine whether and how to exercise discretionary authority. Discretionary

authority must be used reasonably and impartially; never in an arbitrary and capricious manner. The optimal use of discretionary authority is challenging. If health officials make the wrong decision despite ambiguous or unavailable data, the public and media may harshly judge the process, the result, and the decision-makers (Jacobson et al., 2020).

Recognizing the need for simple, step-by-step guidance to aid public health officials faced with these difficult decisions, one of the authors created the Public Health Executive Decision Making Tool, which provides a template to support executive decision-making when confronting a public health threat (Chrysler et al., 2021). The tool does not provide an answer to the Should I? question; instead, it outlines a clear approach for analyzing a public health threat as it unfolds, and for documenting the decision-making process as follows.

1. **Assess the Situation:** Describe the facts as known and understood at the time. Focus on asking the right questions and not assuming the answers, and anticipate a quick evolution of facts and circumstances.
2. **Evaluate the Threat:** Determine the likelihood of the occurrence of each danger or threat based on current evidence. If the danger or threat occurs or continues, what are the potential consequences? During this step, it is important to consider the impact of these outcomes on different populations, especially the most vulnerable.
3. **Discuss Mitigation:** Consider the options and how the threat and/or danger can be addressed. What measures or mitigation might be used? What have others done in similar situations to mitigate impact or likelihood of reoccurrence? Consider the range of potential actions, mindful of the disparate effect on different populations
4. **Assess the Level of Certainty:** Weigh the potential harm of implementing measures or mitigation prematurely against delaying these actions. Before taking action, consider whether there are any other options; what resources are needed to execute and maintain the chosen course of action; how to know when no more intervention is needed; and how to measure success. Not acting is also a decision, not a default.
5. **Communicate:** From the beginning of the process, the executive must determine how much notice and information should be provided to the public. This requires careful deliberation and balance. Key considerations include whether notice will make a difference for those notified, what if any reasons there are for lack of transparency, and what is in the best interest of the public's health. Communicating the most accurate and up-to-date information is essential.

Legal Background

Most of the COVID-19 stay-at-home orders will be issued through a governor's authority to declare an emergency, which each state permits, or through similar actions taken at the local level. Governors and local officials may also rely on a state's public health code or other state laws to confront the pandemic. In this section, we outline those possibilities.

Based on previous work examining public health codes in eight states, the applicable laws will vary across states, but will be similar in structure, language, and intent (Jacobson et al., 2020). For convenience, we use Michigan law as a reasonably representative approach.

Emergency Declarations

In Michigan, the governor has a broad grant of authority to declare an emergency for 28 days under the Emergency Management Act of 1976 "…if he or she finds a disaster has occurred or the threat of a disaster exists". An epidemic constitutes a disaster. After 28 days, the governor must obtain legislative support to continue the emergency declaration (Emergency Management Act, 1976). Furthermore, Michigan's Emergency Powers of Governor Act provides similar authority without limits on the declaration's duration. Both Acts, and their cognates in other states, allow the governor to suspend state laws and rules as necessary to cope with the emergency, including stay-at-home or mask wearing requirements, or closing non-essential businesses.

Neither Act provides criteria or guidance for the governor's exercise of discretion in determining what constitutes a disaster. For good reason, these laws are designed to give the governor maximum flexibility to act quickly to avert or respond to a pandemic or other disaster. Likewise, federal emergency laws provide general authority without specific criteria or guidance.

Public Health Codes

Public health codes invest general authority at the state or local level to prevent disease, extend life, and promote the public health. To do so, health departments may "[a]dopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination." More specifically, most codes recognize the need to take emergency action. In Michigan, for example, the appropriate authority follows "Local Health Department," 2020:

> If the director or local health officer determines that control of an epidemic is necessary to protect the public health, the director or local health officer, by emergency order, may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

The Political and Judicial Contexts

Political Constraints. Despite the broad legal mandate, there are fundamental political, economic, and scientific constraints that any governor must consider in deciding when to issue or relax an emergency declaration. Governors face political and judicial constraints to stay-at-home orders or limiting business operations to those defined as essential. Every governor must balance the dangers of COVID-19 with the economic harm from lengthy stay-at-home orders and potential public health harms such as increased domestic violence or mental health concerns. Maintaining this

balance and communicating it to the public are challenging at a time when trust in governmental public health is low (Udow-Phillips & Lantz, 2020).

In states such as Michigan and Wisconsin, where the governor and state legislature represent different political parties and governing philosophies, political pressure is an inevitable feature of this process. Governors in both states have also faced contentious opposition and demonstrations from segments of the population opposed to any restraints on personal freedoms. More recently, opponents of emergency orders issued by these governors have begun protesting and threatening public health officials, forcing several to resign (Bosman, 2020).

Judicial Constraints. The ability to maintain stay-at-home orders and other restrictions on personal freedoms is not unlimited. So far, no court has yet overturned an emergency order or, though some courts have limited the scope of the orders (Wiley, 2020). Judicial tolerance is unlikely to last as litigation challenges to the restrictions multiply. For example, individual citizens and business owners continue to challenge emergency orders as infringing on fundamental rights, including First Amendment rights of free association and assembly, free speech, and freedom of religion. Litigants also raise Fourteenth Amendment challenges to stay-at-home orders based on due process and equal protection concerns and the right to travel. Other chapters in this Report provide greater detail on the litigation involving contact tracing, quarantine and isolation, privacy, and emergency measures.

In addition, disputes between state legislatures and governors have resulted in litigation. Courts in Wisconsin and Michigan, for instance, have rejected each governor's attempt to extend the respective emergency declarations beyond the statutory maximum of 28 days. In both instances, the legislature successfully sued the governor arguing that the traditional doctrines of separation of powers and checks and balances require legislative input into when and whether to relax the orders. However, Michigan Governor Whitmer was able to use Michigan's Emergency Powers of the Governor Act to retain the emergency declaration. Suffice it to say that courts are likely to place an increasingly high burden on the governors to justify indefinite emergency declarations. In contrast, the governor of Georgia is attempting to enjoin the mayor of Atlanta's mandatory mask-wearing order using separation of powers and state preemption arguments.

Executive Decision-Making: Covid-19

Unlike many other countries that swiftly responded to the emergence of COVID-19 by implementing national programs to curb the spread of the virus, the federal response has been largely absent after the initial March 13 declaration of a national state of emergency. Other than issuing sporadic, and often voluntary, guidance at the national level, the U.S. COVID-19 response has mostly been left to the states.

In COVID-19, the Can I and Must I questions have clear answers in most states—yes, the health officer can act, but there is no requirement to act. For the most part, the key question for a health officer is Should I in two very different contexts: should I recommend a robust stay-at-home order; should I recommend relaxing or terminating the order? No law requires a governor to declare an emergency. By definition, executive actions to declare a public health emergency are discretionary and fall in the category of Should I.

In this section, we focus on how eight states have used their legal authority to address the COVID-19 pandemic, along with recent case data (Figure 7.1). We examined the states' legal responses

Figure 7.1

STATE	GOVERNOR PARTY	LEGISLATURE PARTY	AVG. NEW CASES/ DAY
Alabama	Republican (Kay Ivey)	Republican	July 1: 679 July 16: 1729
Arizona	Republican (Doug Ducey)	Republican	July 1: 2750 July 16: 3249
Colorado	Democrat (Jared Polis)	Democrat	July 1: 212 July 16: 434
Florida	Republican (Ron DeSantis)	Republican	July 1: 3756 July 16: 11,147
Maine	Democrat (Janet T. Mills)	Democrat	July 1: 26 July 16: 17
Michigan	Democrat (Gretchen Whitmer)	Republican	July 1: 294 July 16: 623
Texas	Republican (Greg Abbott)	Republican	July 1: 4348 July 16: 9273
Wisconsin	Democrat (Tony Evers)	Republican	July 1: 330 July 16: 796

relative to the public health input the governors received. For each state, we examined the available emergency orders, the public health advice included in the orders, and consistency of the orders with available public health information. The full exhibit is on file with the authors.

The selected states examined in Figure 7.1 do not represent a random sample. Instead, they are a convenience sample based on geographic distribution, judicial activity, changing pandemic exposure, and political party control. Two states—Maine and Colorado—have Democratic governors and legislatures. In four states — Alabama, Arizona, Florida, and Texas — Republicans have full political control. Two states — Michigan and Wisconsin — have Democratic governors and Republican legislatures.

Analysis

Party Control. All of the sampled states issued stay-at-home orders in March 2020. After that, the states varied on when they relaxed the emergency orders and what other requirements accompanied reopening.

Four of the states with full Republican party control — Alabama, Arizona, Florida, and Texas — imposed no requirements in their initial emergency declarations. Instead, they relied on public health messages to encourage adherence to CDC guidelines regarding social distancing or wearing masks. In contrast, the other four states, two with full Democratic party control and two with a Democratic governor and Republican legislature, required wearing masks in public and banned gatherings of more than 10 persons. Each of these states opted for a phased reopening.

Role of Science. Although each of the initial emergency orders relied on public health data and collaboration with the state's health department, it is difficult to determine whether science actually guided decision-making for reopening or was subordinate to political and economic concerns. In most jurisdictions, science is vulnerable to elected officials' oversight. As the crisis evolved, several states either substantially relaxed their emergency declarations or implemented a phased approach to reopening, even as case numbers continued to rise.

Public health science played a prominent role in three states' emergency declarations: Maine, Colorado, and Wisconsin. In contrast to other states in our sample, these states have experienced only small increases in cases (Figure 7.1). Most likely, public health officials were involved in the other states' decision-making process.

Maine's commitment to following public health advice was incorporated into the emergency declaration. The director of the state's Department of Health and Human Services provided trends, metrics, and advice to "guide the timing pace and scope of any easing of [ ] restrictions."

In Colorado, the initial order noted that the state's approach was implemented after consultation "with public health officials" and is "based on models… proven effective." Similarly in Wisconsin, after declaring a health emergency and directing the state's Department of Health Services (DHS) to lead the COVID-19 response, Wisconsin began a phased reopen subject to DHS's "assess[ment of] the most up-to-date data to determine when it is appropriate to progress to the next Phase."

Equity. The Emergency Declarations in our sample included minimal equity considerations or specific reference to vulnerable populations. For instance, Colorado requires essential workers and state employees to receive paid sick leave if they exhibit COVID-19 symptoms. Michigan exempted workers from the stay-at-home order who provide "food, shelter…for economically disadvantaged or otherwise needy individuals,… and people with disabilities," while Wisconsin exempted homeless individuals or unsafe residences (e.g., due to domestic violence).

Reopening. Despite issuing stay-at-home orders relatively early and, in most cases, waiting until May to begin reopening, four of the states surveyed are experiencing significant increases in cases — Alabama, Arizona, Florida, and Texas. In deciding to re-open, several states relied on their health department's advice. In Michigan, for instance, the governor stated, "In determining whether to maintain, intensify, or relax its restrictions, [the governor] will consider, among other things… data on COVID-19 infections and the disease's rate of spread." Some states, including Texas and Florida, have recently re-imposed restrictions as noted above because of spikes in COVID-19 cases.

After each state experienced a spike in COVID-19 cases, the orders were amended to: require masks for employees and ban gatherings of more than 25 persons (Alabama); close bars and allow local officials to require masks (Arizona); and close bars and ban gatherings of more than 100 persons (Texas). On July 2, the governor of Texas required wearing masks in public throughout most of the state.

Alabama began relaxing stay at home requirements May 21, but saw its numbers increasing by 32% compared to two weeks prior. Notably, industries and businesses were "strongly encouraged" but not required to follow the state Department of Public Health's guidance.

Arizona began reopening after data showed "continued progress in mitigating and limiting the spread of COVID-19 and sustaining adequate hospital capacity" according to the re-open order. Florida's re-open order on April 29th insisted that "data collected by the Florida Department of Health indicates the State has achieved several critical benchmarks in flattening the curve." Nonetheless, both states have seen a significant rise in cases since reopening.

Discussion

It should come as no surprise that states varied widely in their COVID-19 responses. Indeed, one might argue that this is a desirable feature of federalism where states can learn from alternative policy approaches. But it appears to be suboptimal in a pandemic that obviously ignores such boundaries and where a national approach would be preferable.

It would be nice to conclude that public health science has guided executive decision making in the COVID-19 pandemic, with politics as subordinate. In all likelihood, the reality is that the science is filtered through a very thick political lens. In short, governors making political decisions drove the process, not public health officials relying on the best available science.

The fact that four states re-opened without any real requirements to address the threat of spreading or contracting the disease indicates the limits of public health science in shaping governors' decisions. Even so, it appears that science has been influential at two points — the initial emergency declarations, and deciding to retrench when states re-opened too quickly.

In fairness, the facts on the ground change so quickly that it is hard to blame governors and public health officials for struggling with COVID-19. Nevertheless, governors should be accountable if they either ignored the science or re-opened prematurely despite the science. Likewise, the American public needs to improve its compliance with recommendations for social distancing and mask-wearing. Without in any way understating those difficulties, governors could do a better job of communicating why social distancing and wearing a mask are essential for slowing the pandemic and mitigating its dreadful consequences.

Recommendations for Action

State and local governments:

- Every emergency declaration should include the following information:
  - Specific epidemiological data supporting the order;
  - Specific requirements for social distancing and mask wearing;
  - An explanation of why the order is needed;
  - An explanation of why the order does not violate personal freedoms.
- Communications with the public should be transparent and provide:
  - Current, accurate, and complete information;
  - Clear, understandable, and effective recommendations/requirements to keep people safe;
  - Reinforce that social-distancing and mask-wearing are the keys to eradicating COVID-19.
- Governors must protect public health officials from any threats to their health and safety.
- Governors should instruct public health officials to incorporate equity considerations and address the needs of vulnerable populations.
- States and localities should collect and analyze complete and accurate COVID-19 morbidity and mortality data on disparities by race, ethnicity, and age.

About the Authors

Peter D. Jacobson, JD, MPH, is Professor Emeritus of Health Law and Policy, and Director, Center for Law, Ethics, and Health, at the University of Michigan School of Public Health, where he taught health law, public health law, and health policy. Currently, he is the principal investigator for the Mid-States Region of the Network for Public Health Law, and formerly served as Chair of the Washtenaw County (Michigan) Board of Health. Jacobson's previous research examined health departments' strategic adaptations, public health entrepreneurship, and the Flint Water Crisis. In 2017, he received the Distinguished Health Law Professor Award from ASLME.

Denise Chrysler, JD, has been a public health attorney for over 30 years. She directs the Network for Public Health Law's Mid-States Region at the University of Michigan School of Public Health. Her legal work covers communicable disease, environmental public health, public health research, privacy, data exchange, and emergency preparedness and response. Denise serves on Michigan's Public Health Advisory Council, which was created after the Flint Water Crisis to advise the governor on public health matters, including Michigan's governmental structure for protecting the public against health threats. Denise also serves as a member of her local board of health.

Jessica Bresler, JD, is a recent graduate from Northeastern University School of Law with certificates in both Health Law and Policy and Criminal Law and Justice. She is currently a Research Assistant with the Center for Health Policy and Law working on the COVID-19 Rapid Legal Assessment. She has written extensively about the opioid crisis and safe consumption sites: in addition to co-authoring an opinion piece with Leo Beletsky, she received second place in the American College of Legal Medicine's student writing competition. She is currently co-authoring a book chapter on how the pharmaceutical company-prescriber relationship affected and contributed to the ongoing opioid crisis.

References

Adeline, S., Hanzhang Jin, C., Hurt, A., Wilburn, T., Wood, D., & Talbot, R. (2020). Tracking the Pandemic: Are Coronavirus Cases Rising or Falling in Your State? Retrieved July 22, 2020, from https://www.npr.org/sections/health-shots/2020/03/16/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s

Bosman, J. (2020). Local Officials Fighting Crisis Now Endure Death Threats. *New York Times*. June 23, 2020, p. A10.

Chrysler D., Gable L., Levin D., Jacobson P.D. (2021). Public Health Decision-Making: Responsibilities, Strategies, and Consequences. In M.N. Ransom & L.M. Valladares (Eds.), Public Health Law: Concepts and Case Studies, New York: Springer Publishing Company.

Emergency Management Act, Michigan Compiled Laws §30.401 et seq. (1976).

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

Jacobson, P. D., Boufides, C. H., Chrysler, D., Bernstein, J., & Citrin, T. (2020). The Role of the Legal System in the Flint Water Crisis. *The Milbank Quarterly*, 98(2), 554-580.

Multistate (2020). COVID-19 State and Local Policy Dashboard. Retrieved July 22, 2020, from https://www.multistate.us/research/covid/public

Udow-Phillips, M., & Lantz, P. M. (2020). Trust in Public Health is Essential Amid the COVID-19 Pandemic. *Journal of Hospital Medicine*, DOI 10.12788/jhm.3474.

Wiley, LF. (2020). The Emerging Law of Social Distancing. Draft manuscript on file with the authors.

Youngberg v. Romeo, 457 U.S. 307 (1982).