

Summary of Recommendations for Using Government Powers to Control the Pandemic

Compiled and edited by the Editorial Committee

The editors asked the authors to provide their best recommendations for legal action in response to COVID-19. Recommendations for *Using Government Powers to Control the Pandemic* address basic public health measures such as physical distancing, travel bans and contact tracing. These recommendations include both calls for urgent action now, as well as longer term changes that reflect the way the pandemic has highlighted deeper problems in American law and policy. We have organized the recommendations into federal, state, local and Tribal guidance.

Each recommendation is referenced back to its author(s). Please refer to specific chapters for a complete list of recommendations on a particular topic.

Action at the Federal Level

- To strengthen capacity and reduce political interference with scientific analysis, Congress should urgently consider legislation to reorganize the CDC as an independent agency, on the model of the Federal Reserve (Wiley, Federalism)
- To strengthen capacity and reduce political interference with scientific analysis, Congress should consider making FDA a stand-alone agency, outside of HHS (Zettler et al., Drug and Vaccine Development)
- Congress should amend the Public Health Services Act to add transparency and accountability mechanisms requiring the HHS Secretary and CDC Director to articulate the scientific basis for any guidance or orders issued pursuant to the authority provided by the Public Health Service Act to control the spread of communicable disease (Wiley, Federalism)
- Congress should fund and CDC should take the lead in developing a unified national approach to rapid testing, contact tracing, and isolation of people infected with COVID-19 (Gable, Mass Movement)
- CDC should develop rigorous, scientifically grounded, apolitical guidance for safe operation of schools, businesses, and indoor and other settings to assist government officials in making risk assessment decisions to prevent the spread of COVID-19 (Gable, Mass Movement)
- To assure the collection and dissemination of data necessary to guide public and private action,
 - o Congress should mandate and fund an effort to rebuild CDC's information infrastructure to ensure its disease surveillance reports and guidelines to governments, clinicians, businesses, private organizations, and individuals are accurate and free from political interference (Wiley, Federalism)
 - o Congress, HHS, or CDC should require enhanced demographic data collection as a condition of federal health care and public health funding, at all times, so that data regarding key identifying characteristics are collected consistently by state or local health departments (Huberfeld and Watson, Medicaid; Harris and Pamukcu, Civil Rights)
 - CDC should collect (and ask state and local agencies to collect) data regarding individuals' sexual orientation and gender identity This may, in part, be modeled on data collection in the National Health Interview Survey (Konnoth, Supporting LGBT Communities)
 - Congress should require HHS to collect and publicly report standardized data related to COVID-19 testing, infections, treatment, and outcomes including data disaggregated by disability status using data collection standards for disability that have been developed under the ACA (Pendo, Protecting the Rights of People with Disabilities)
 - o Agencies, including the CDC, should coordinate and standardize data collection efforts so that data sets can be effectively combined, and ensure that complete data is made publicly available and accessible to researchers (Harris and Pamukcu, Civil Rights; Anderson and Burris, Is Law Working)
- To facilitate appropriate use of technology in pandemic control, Congress should enact a statute that safeguards individuals from the risks that attend to digital COVID-19 contact tracing applications. Legislation should
 - o Ensure user privacy
 - o Assure informed, voluntary participation
 - o Respect user autonomy
 - o Prohibit discrimination and the dissemination of collected information to non-public health authorities
 - o Prescribe the commercial use of collected data, mandate government transparency and accuracy, guarantee data security
 - o Include a sunset provision
 - o Extend to users a privacy right of action (Oliva, Surveillance)

- The federal government should base travel bans on epidemiological factors, rather than nationality or immigration status (Parmet, Immigration)
- CDC should repeal its new interim final rule and base exclusion orders on the risk presented by travelers rather than their nationality. CDC's orders should not be used to override asylum laws (Parmet, Immigration)

Tracing; see also Gable, Mass Movement and Anderson and Burris, Is Law Working)

- Every emergency declaration should include the following information:
 - o Specific epidemiological data supporting the order
 - o Specific requirements for social distancing and mask wearing
 - o An explanation of why the order is needed
 - o An explanation of why the order does not violate personal freedoms (Jacobson et al., Executive Decision Making; Wiley, Federalism)
- Governors must protect public health officials from any threats to their health and safety (Jacobson et al., Executive Decision Making)
- Legislators should mandate and provide sufficient funding to support improved data collection efforts across agencies and departments to ensure critical demographic data is collected and analyzed to properly inform policy decisions (Harris and Pamukcu, Civil Rights)
 - o State health departments should follow the lead of Pennsylvania and California in collecting data on sexual orientation and gender identity (Konnoth, Supporting LGBT Communities)
 - o Pursuant to federal direction or on their own initiative, states should require the collection and public reporting of standardized data related to COVID-19 testing, infections, treatment, and outcomes including data disaggregated by disability status, using data collection standards for disability that have been developed under the ACA (Pendo, Protecting the Rights of People with Disabilities)
- In the absence of federal action to facilitate appropriate use of technology in pandemic control, states should enact a statute that safeguards individuals from the risks that attend to digital COVID-19 contact tracing applications. Legislation should
 - o Ensure user privacy
 - o Assure informed, voluntary participation
 - o Respect user autonomy
 - o Prohibit discrimination and the dissemination of collected information to non-public health authorities
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Action at the State Level

- State legislatures should amend or enact new public health legislation clarifying the scope and authority of state officials to limit person-to-person interaction and impose closures, movement restrictions, gathering bans, and physical distancing requirements (Gable, Mass Movement)
- In the face of rising rates of infection and increasing community spread, governors and legislators should use their police power to
 - o Continue to promote physical distancing with measures that include incentives, supportive programs, and legal protections that support compliance and reduce inequitable disparate impact of gathering restrictions and closures (Gable, Mass Movement; Anderson and Burris, Is Law Working)
 - o Require mask wearing where strict physical distancing restrictions are relaxed or inapplicable
 - Mask wearing in settings where physical distance cannot be maintained, and voluntary reduction of social contacts, would be sensible for everyone to maintain for the foreseeable future regardless of legal requirements (Anderson and Burris, Is Law Working)
- State legislatures should fund, and state health departments should implement and/or contract for robust, ongoing contact tracing systems that
 - o Are closely connected to the communities they serve, including employment of a culturally diverse and sensitive workforce
 - o Engage existing community-based organizations to facilitate connection with diverse local communities and service needs
 - State health departments, in their implementation of contact tracing training and programs, should seek to identify and address unique barriers and concerns that may arise with outreach and service provision efforts to immigrant and migrant populations, including issues associated with immigration and public charge rules
 - State health departments should develop and implement expanded, multi-lingual health communication efforts to boost public trust and participation in, and awareness of, contact tracing initiatives
 - o Ensure those testing positive and identified as close contacts have access to health care, mental health, social services, and employment and housing protections needed for effective SARS-CoV-2 treatment and quarantine
 - o Include regular reporting to the public on contact tracing outreach and case ascertainment efforts (Silverman, Contact

Action at the Local Level

- Local ordinances should authorize targeted and scientifically appropriate closure, movement, and physical distancing restrictions consistent with stopping the spread of COVID-19 in local communities, and local governments should use these powers as needed (Gable, Mass Movement)

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 - o Specific epidemiological data supporting the order
 - o Specific requirements for social distancing and mask wearing
 - o An explanation of why the order is needed
 - o An explanation of why the order does not violate personal freedoms
- Mayors and county executives must protect public health officials from any threats to their health and safety (Jacobson et al, Executive Decision Making)
- Local governments should fund, and local health departments should implement and/or contract for robust, ongoing contact tracing systems that
 - o Are closely connected to the communities they serve, including employment of a culturally diverse and sensitive workforce
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 - o Ensure those testing positive and identified as close contacts have access to health care, mental health care, social services, and employment and housing protections needed for effective SARS-CoV-2 treatment and quarantine
 - o Include regular reporting to the public on contact tracing outreach and case ascertainment efforts (Silverman, Contact Tracing)
- Local governments should enact paid sick leave policies with anti-retaliation provisions to support and encourage workers to remain at home when they are experiencing COVID-19 symptoms (Skar, Will the Coronavirus Make Us Rethink Quality Care)
- Local health departments and other agencies should collect detailed data on the populations and geographies most affected by COVID-19 and use this data to effectively allocate resources to the most impacted people and places (Harris and Pamukcu, Civil Rights)
 - o Local governments should require the collection and public reporting of standardized data related to COVID-19 testing, infections, treatment, and outcomes including data disaggregated by disability status, using data collection standards for disability that have been developed under the ACA (Pendo, Protecting the Rights of People with Disabilities)
 - o Where possible, pursue coordinated regional data collection efforts (Harris and Pamukcu, Civil Rights; see also Hoss and Tanana, Upholding Tribal Sovereignty)

Action at the Tribal Level

- Tribal governments should consider incorporating culturally appropriate mechanisms in legal measures to contain the spread of COVID-19
- If not already in place, Tribal governments should consider passing a public health code that contemplates issues of health communications, quarantine and isolation, incident command systems, and a point of contact for public health issues for the Tribe (Hoss and Tanana, Upholding Tribal Sovereignty)
- Tribes should consider including the following information in emergency declaration:
 - o Specific epidemiological data supporting the order
 - o Specific requirements for social distancing and mask wearing
 - o An explanation of why the order is needed
 - o An explanation of why the order does not violate personal freedoms (See Jacobson et al., Executive Decision Making; Wiley, Federalism)
- Tribal governments must protect public health officials from any threats to their health and safety (See Jacobson et al., Executive Decision Making)
- In the absence of federal action to facilitate appropriate use of technology in pandemic control, Tribes should consider enacting a statute that safeguards individuals from the risks that attend to digital COVID-19 contact tracing applications. Legislation should
 - o Ensure user privacy
 - o Assure informed, voluntary participation
 - o Respect user autonomy
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 - o Extend to users a privacy right of action (See Oliva, Surveillance)